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Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

CHARLES FREEMAN and ROSALYN BROWN,

*Petitioners,*

v.

THE CITY OF DALLAS, TEXAS,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Did the City's dispatch of a work crew that entered petitioners' property and seized and demolished two small substandard apartment buildings by order of a City board but without a warrant or other judicial process violate the prohibition against unreasonable seizures in the Fourth Amendment and the prohibition against causing deprivations of property without due process in the Fourteenth Amendment?

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners Charles Freeman and Rosalyn Brown respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals sitting en banc (App. 1-55)[1] is reported at 242 F.3d 642. The court of appeals' order granting a rehearing en banc is reported at 200 F.3d 884. The opinion of the panel of the court of appeals (App. 56-83) is reported at 186 F.3d 601. The orders of the district court (App. 84-90) are unreported.

## JURISDICTION

The judgment of the court of appeals was entered on February 22, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

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[1] "App." refers to the appendix bound with this petition for a writ of certiorari.

searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized." Fourth Amendment to the United States Constitution.

" . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . " Due Process Clause of the Fourteenth Amendment to the United States Constitution.

## STATEMENT

Petitioners Charles Freeman and his sister, Rosalyn Brown, owned the land and the small, vacant, multi-family structures located at 2611 and 2621 Meyers St., in Dallas, Texas. R-1, 76.[2] Mr. Freeman was in the process of rehabilitating these apartments for use as rental property.[3] R-1, 76-77.

Mr. Freeman arrived at his property and found a demolition crew tearing down one of his buildings. The crew had already razed his other building on the adjoining property, broken up the foundation, and cleared that lot. R-8, 62-64.

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[2] In this Petition, citation to the Record on Appeal in the Fifth Circuit is by "R-___, ___." R-___ refers to the Record Volume number and is followed by the page number.

[3] Mr. Freeman owned a 1% interest and Ms. Brown owned a 99% interest in the properties. Mr. Freeman was the attorney-in-fact for Ms. Brown. R-1, 76.

Mr. Freeman jumped onto the demolition crew's backhoe, told the operator that he was repairing the building, asked him to stop the demolition. The demolition crew stopped work but called the police. R-8, 64. The City police arrived and ordered Mr. Freeman to vacate his property or face arrest. R-8, 65. Mr. Freeman left the property and watched the demolition crew continue to tear down the building. R-8, 65. The police did not allow him to remove his personal property or building materials from the building. R-8, 70. The City's crew knocked down the rest of the building, broke up and removed the foundation, and cleared the lot. R-8, 66.

The City assessed $15,610.27 against Mr. Freeman and Ms. Brown for the costs incurred by the City in demolishing the structures. R-1, 93, 106. The City placed liens on the properties for the assessed amount and accruing interest. R-1, 117-118. The City did not provide Mr. Freeman or Ms. Brown with an opportunity to contest the assessed costs or the liens. R-1, 117.

The only authorization for the entry and seizure was the demolition order issued by the Urban Rehabilitation Standards Board [URSB], the City's citizen volunteer board. (App. 88.)

No emergency or other exigent circumstances required the immediate removal of the buildings. R-1, 77-78. The buildings were boarded up and secure from unauthorized entry. The City inspector could not even find a way to enter one building for an inspection of the interior. R-1, 77-78. The City introduced no evidence that the properties were hazards at the citizen board hearings. R-1, 81-84, 87-93, 96-98, 101-105. Instead, the comments

by the Board chair and other members showed that these eight-unit apartment buildings were in fact repairable properties. However, the Board members doubted that Mr. Freeman had the financial resources to repair the buildings. R-1, 83, 103-105. The City's cost estimates, when broken down by unit, are $10,500 per unit for one building and $13,585 per unit for the other. S.R.E. 13, 14, 25, 26.[4] Mr. Freeman testified that he had various materials on hand and that he could repair the properties for approximately $2,000 per unit. R-1, 101-105. One City employee commented that demolition of Mr. Freeman's buildings was appropriate because in her opinion the entire neighborhood needed to be demolished. R-1, 104. The City waited more than six months after its citizen volunteer board issued the demolition orders before seizing the properties for demolition. R-1, 77-78.

Neither the City's ordinance in effect at the time nor the state statute on demolition of substandard buildings required the City to obtain judicial warrant or other judicial authorization before seizing and demolishing buildings. Tex. Loc. Gov't Code Ann., §§ 54.031, et seq., §§ 214.001, et seq. (Vernon 1999); Dallas City Code § 27.

The state statute establishing the quasi-judicial process the City uses to demolish buildings is Texas Local Government Code, §§ 54.031, et seq., Subchapter C. Quasi-Judicial Enforcement of Health and Safety

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[4] "S.R.E. ___" refers to Mr. Freeman's and Ms. Brown's Supplemental Record Excerpts filed in the Fifth Circuit.

Ordinances.[5] The statute allows the City to appoint a commission to hear and determine cases relating to violations of the housing codes and other ordinances. Tex. Loc. Gov't Code § 54.032, § 54.033. The commission has the power to declare a building substandard, enter on private property to remove persons and property, issue orders and directives to any peace officer of the state or the chief of police to enforce and carry out the orders and directives of the commission, and assess civil penalties. Tex. Loc. Gov't Code § 54.036.

Judicial review of the commission's decision is pursuant to a request for a discretionary writ of certiorari to the state district court.[6] Tex. Loc. Gov't Code § 54.039. The judicial review is limited to determining whether there was substantial evidence for the commission decision. Tex. Loc. Gov't Code § 54.039(f). The property owner, even if successful, cannot recover costs or attorneys' fees. The City, even if the court modifies the order, is entitled to an award of attorneys' fees, costs, and expenses. Tex. Loc. Gov't Code § 54.039(h).

Mr. Freeman did not attempt to file a writ of certiorari for review of the demolition orders for his buildings. (App. 7). If Mr. Freeman had appealed the board

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[5] There is a parallel statute allowing the "municipality" rather than a City commission to order demolition. Tex. Local Gov't Code Ann., § 214.001, et seq. (Vernon 1999).

[6] The Fifth Circuit en banc majority's citation to the judicial review for state agency action, Texas Government Code § 2001.174, at App. 4, is inexplicable as support for the judicial review available for the URSB decision. That provision applies by its own terms only to state agencies, not City commissions. Tex. Gov't Code Ann., § 2001.001, § 2001.003(7) (Vernon 2000).

demolition orders to district court, it would not have stayed the demolition orders concerning his buildings. The judicial review available does not include preliminary relief from the operation of the demolition order. Even if the district court grants the writ and takes the case for review, there is no stay of the commission's demolition order. Tex. Loc. Gov't Code § 54.039(e). In 1993, the State amended the statute to eliminate the district court's authority to grant a restraining order or injunction against a demolition order.[7] Acts 1993, 73rd Leg., chap. 836, § 7 (eff. Sept. 1, 1993) (codified at Tex. Loc. Gov't Code § 54.039). A district court suit for a restraining order or an injunction against the demolition order does not state a valid claim. The writ of certiorari is the only available relief. *Nussbaum v. City of Dallas*, 948 S.W.2d 305, 307-308 (Tex. Civ. App. Dallas 1996).

The City's commission, called the Urban Rehabilitation Standards Board, determines whether structures referred to it by City staff are urban nuisances. (App. 3). The URSB can order repairs, vacation and closure, demolition, receivership, and civil penalties of up to $2,000 a day. (App. 3). The City's commission is composed of 30 appointed members and eight alternates. Dallas City Code § 27-6. The ordinance requires the URSB to consist of an architect, a mortgage loan banker, a home builder, a licensed real estate broker, a social or welfare worker, a structural engineer and other members chosen on the

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[7] The same limitations on judicial review apply to the parallel statute allowing the "municipality" to order and secure demolitions. Tex. Loc. Gov't Code Ann., § 214.0012 (Vernon 1999).

basis of their interest in community affairs. Dallas City Code, § 27-6. Separate panels of the citizen commission hear and decide the individual cases. (App. 3).

The first step in the City's process is the City field inspector's decision to refer a building to the URSB. The inspector fills out a referral form. This unsworn form contains information about the type of structure, vacancy status, tax valuations, location, zoning, code enforcement history, repair cost estimates, demolition cost estimates, condition, and staff recommendation. The staff provides the information in the form to the URSB in the URSB Docket Sheet. R-1, 80, 94. The City does not give either the form or the information in the form to the property owner. R-1, 109-110.

The City presents its case against a property ex parte to the URSB in two ex parte stages before the hearing. First, the City staff presents its evidence to the URSB at an ex parte meeting with City staff, without notice to the property owner, when the URSB panel members, the URSB Administrator, and the City staff meet together in the morning before the afternoon URSB hearings. At this meeting, called a briefing, the URSB Board members first see the City's evidence on the specific cases. Each URSB member receives a docket sheet for each property detailing the history of the case, the information from the referral sheet, and the information deemed relevant by the City staff. R-1, 106-107. At the briefings, the Board members have the opportunity to ask questions of the City staff about the properties involved in the cases that they will hear that day. The Administrator informs the Board of all information she has received via a telephone or written communication on cases that will be heard.

The URSB members and City staff can engage in a full and frank discussion of the specific cases that will be heard. R-1, 107.

The City never provides the property owners with the docket sheets that it gives to the URSB members. R-1, 109-111. The unsworn URSB docket sheets contain much of the information in the code inspector's referral form. The docket sheets contain the same repair cost estimates that are on the referral forms filled out by the inspector before the hearings and do not take into account any repairs that have been made since the referral. R-1, 80, 94-95. When the inspector does not inspect the interior of a building, as was the case with one of Mr. Freeman's buildings, the City calculates the repair estimates by multiplying the square foot measurement of the building by $22.00 per square foot. R-1, 94. The basis for the City's repair estimates are unknown, even to those officials most familiar with the URSB process. R-1, 114; R-5, 7, 78-79.

The second stage of the ex parte presentation occurs after the briefing. The URSB members divide into smaller groups of URSB members and staff persons. These groups make unannounced tours of properties scheduled for hearings that day. R-1, 108. A City staff person conducts the tour. Unless there is a "no trespassing" sign, the panel members and City staff enter the building if possible. About 10% of the time the groups encounter the owner or a neighbor. R-1, 108.

The URSB's decision for each property is based, at least in part, on the impressions gathered during the tour. During the tour and out of the presence of the property

owner, the Board members and the staff typically discuss violations of the properties that they are viewing and that will be heard in the afternoon hearings. They carry with them the entire URSB file for each property and refer to it during the tour. They do not give the property owners notice of this fact-finding mission or the opportunity to be present. No record is made of the discussions during the tours. The City does not provide the URSB file to the property owner at any point during the URSB process and did not provide it to Mr. Freeman. R-1, 108-110.

Although Mr. Freeman appeared at the URSB hearings and rehearings held on the properties, the City never provided him with the specific allegations of substandard and hazardous conditions or the evidence of such conditions that the URSB was considering in the cases against his properties. R-1, 81, 95. The City introduced no documents into evidence at any of the hearings. R-1, 84, 98. The only City evidence at the hearings was photographs of the buildings. R-1, 109. The field inspector, who had inspected the properties, referred them to the URSB, and prepared the repair cost estimates never appeared or testified at any of the hearings. R-1, 111. The City did not call any witness to testify on the condition of the properties. R-1, 81-84, 87-93, 96-98, 101-105. The City never informed Mr. Freeman or Ms. Brown of the ex parte briefings held with City staff concerning the properties or of the ex parte tour taken of the properties by the Board members. Mr. Freeman was present when the board and staff members visited his property on the day of the rehearing of his case. R-1, 107, 109.

Neither the City staff nor the URSB informed Mr. Freeman that he had the burden of proof to show that

repairs were feasible. R-1, 81-84, 96-98. Mr. Freeman did not know the City had cost estimates to repair his property until the middle of the rehearing on one of his buildings when a Board member asked him if he was aware that the City estimated it would cost $84,310 to repair the building. R-1, 89.

At the conclusion of the hearing, the URSB issued a form document entitled "Notice of Demolition." There are no allegations of facts or reasons for the order. The "Notice of Demolition" does not state that the buildings are hazards or nuisances. The document is unsworn. S.R.E. 2, 16. The "Notice of Demolition" issued after the rehearing states that any appeal to district court must be filed within 20 days and that appeal is limited to a hearing under the substantial evidence rule. S.R.E. 5, 19.

The URSB's post-hearing procedure in petitioners' case was the same procedure followed in all cases. There are no documents stating the facts or reasons upon which the URSB bases its hearing decisions. R-1, 85, 99, 113. The official minutes of the hearings do not contain any explanation of the facts or other reasons upon which the URSB bases its decisions. R-2, 14-15, 25-26, 44-45, 50-51. The URSB mails a form captioned "Notice of Demolition Order" which states that an order of demolition has been issued. The stated basis for the order is a boilerplate statement: "Having inspected the property in question and hearing testimony and evidence supplied by the Administrator and staff, after due consideration the Board examined the facts and evidence and found that the structure(s) constitute an urban nuisance and ordered the demolition of ALL improvements to ground level. The notice states that if the owner does not demolish the

property, the City will. The notice provides no facts or specific reasons for the decision. The notice does not state that the buildings are hazards. The document is notarized but the only averment is that the Administrator is the person who signed the notice. S.R.E. 3, 6, 17, 20.

Acting under these procedures, the City's URSB found Mr. Freeman's property to be an "urban nuisance." (App. 5). The City's ordinance does not limit its definition of an "urban nuisance" to hazardous conditions. In addition to hazardous conditions, a property may be an urban nuisance if it is in disrepair and if it "would be substantially offensive and annoying to persons of ordinary sensibilities, tastes and habits living in the community." Dallas City Code § 27-3(23). The City may demolish buildings under this subjective definition of "urban nuisance." R-1, 114-115. The demolition orders do not specify if the City has ordered demolition because of hazardous conditions or because the structure is annoying or offensive. S.R.E. 2, 3, 5, 6. The orders issued for Mr. Freeman's properties do not say whether the buildings are nuisances because of hazardous conditions or because they are annoying. S.R.E. 2, 3, 5, 6.

There are no legal or procedural criteria to guide the URSB in its decision-making other than the urban nuisance ordinance. R-1, 113-115. The ordinance sets forth no criteria or standards for the Board to apply when deciding whether to order demolition or repair of a structure. R-1, 113-114. No verbal or written criteria or standards exist for the Board to apply in determining whether or not to order demolition or repair. R-1, 114. There is nothing in the ordinance that requires the URSB to base its decision solely on the evidence. R-1, 113. There are no

standards for admissibility of evidence at the URSB hearings. R-1, 115. It is impossible for even the City staff to know the standards applied by the URSB in any individual URSB decision. R-1, 115.

There are no written or verbal standards to explain, clarify, or give additional meaning to the nuisance standard that includes the nebulous conditions that "could be substantially offensive and annoying to persons of ordinary sensibility, tastes and habits living in the community." R-1, 114. Each member of the URSB applies this portion of the nuisance ordinance in a manner that is subjective to each person. R-1, 115.

The URSB finds 99% of the properties that come before it to be urban nuisances. The board heard 7,575 cases between Oct. 1, 1990, and Sept. 31, 1996. It found all but 73 to be urban nuisances. R-2, 59. Most of the demolition orders issued by the URSB are against residential structures including single family homes. *See, e.g., Thomas v. City of Dallas,* 175 F.3d 358 (5th Cir. 1999) (City URSB demolition of single family home without notice to the homeowner); *James v. City of Dallas,* 2000 U.S. Dist. LEXIS 4633 (N.D. Tex. 2000) (class certification of homeowners with repairable single family homes demolished by the City URSB); *Burns v. City of Dallas,* 1997 U.S. Dist. LEXIS 16666 (N.D. Tex. 1997) (City URSB demolition of a single family house in violation of Fourth and Fourteenth Amendments); *Swann v. City of Dallas,* 922 F.Supp. 1184 (N.D. Tex. 1996) (unconstitutional demolition of a residential apartment building by the URSB). Of the 2,180 structures demolished by the City between 1990 and 1995, 1,902 were residential. R-2, 59.

On April 23, 1996, Mr. Freeman and Ms. Brown sued the City in federal district court under 42 U.S.C. § 1983, alleging that the City seized and demolished their buildings in violation of the Fourth and Fourteenth Amendments to the U.S. Constitution. (App. 7). Both parties moved for summary judgment. (App. 84). The district court held that the City violated the Fourth Amendment by seizing and destroying the buildings without judicial process or a warrant. (App. 84, 88). The district court found no violation of the Fourteenth Amendment right to due process. (App. 85, 88-89). The district court then submitted the issue of damages for the City's violation of the Fourth Amendment to the jury. The jury awarded $20,000 in damages for demolition of plaintiffs' buildings in violation of the Fourth Amendment to the U.S. Constitution. (App. 85). The district court entered the Final Judgment on August 13, 1997, reflecting the decision of the court with respect to the summary judgment issues and the jury verdict. (App. 84-85).

The City appealed the district court's final judgment concerning the Fourth Amendment and award of damages. Mr. Freeman and Ms. Brown cross-appealed the district court's final judgment regarding the issue of due process. (App. 62).

The Fifth Circuit panel affirmed the district court's holdings on August 18, 1999. (App. 56-57). A panel majority agreed that the City violated the Fourth Amendment by failing to get a warrant or other judicial authorization

before entry and destruction of plaintiffs' properties.[8] (App. 56-65). A panel majority affirmed the district court holding that the City did not violate the Fourteenth Amendment guarantee of due process in this case.[9] (App. 65-69).

The Fifth Circuit granted the City's petition for rehearing en banc to reconsider the Fourth Amendment ruling. *Freeman v. City of Dallas*, 200 F.3d 884 (5th Cir. 2000).

The Fifth Circuit issued the en banc opinion on February 22, 2001.[10] (App. 1-55). In an opinion by Judge Jones, the en banc court reversed the panel opinion concerning the Fourth Amendment. (App 1-25). Four judges dissented from this holding regarding the Fourth Amendment. (App. 25-50). The en banc court also reinstated the panel opinion that there had been no violation of the Fourteenth Amendment, and Judge Dennis dissented from this holding. (App. 4, 50-55).

The Fifth Circuit en banc opinion held that a warrant is unnecessary when a municipality seizes property that has been declared a nuisance by an established police

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[8] Judge Dennis and Judge Benavides formed the panel majority for the Fourth Amendment holding. (App. 56-65). Judge Garza dissented from the majority opinion regarding the issue of the Fourth Amendment. (App. 69-79).

[9] A separate panel majority of Judge Garza and Judge Benavides held that there had been no violation of due process under the Fourteenth Amendment. (App. 65-69). Judge Dennis dissented from this holding concerning due process. (App. 79-83).

[10] The opinion was revised on March 5, 2001. (App. 1).

power procedure. (App. 2). The en banc majority found that the reasonableness test was met in this case by the City's adherence to its ordinances and procedures as a prelude to ordering the landowners to abate their nuisance structures. (App. 23-24).

Four judges dissented from the en banc majority opinion on the issue of the Fourth Amendment. (App. 25-50). The dissent on the Fourth Amendment issue argued that the majority opinion resurrected the rule in *Frank v. Maryland,* 359 U.S. 360 (1959), which was overruled by the Supreme Court in *Camara v. Mun. Court of San Francisco,* 387 U.S. 523 (1967) and *See v. Seattle,* 387 U.S. 541 (1967). (App. 34-35).

## REASONS FOR GRANTING THE PETITION

**Fourth Amendment issue**

1. The decision of the United States Court of Appeals for the Fifth Circuit in this case conflicts with the decisions of other United States Courts of Appeals on the important Fourth Amendment issue of whether a warrant or other judicial process is necessary before a City may send a work crew onto private property to seize and destroy private property that a non-judicial, administrative hearing process has declared a nuisance.

The Fifth Circuit's result and reasoning in support of the result directly contradict the result and the reasoning of the United States Court of Appeals for the Ninth Circuit in *Conner v. City of Santa Ana,* 897 F.2d 1487 (9th

Cir. 1990), *cert. denied*, 498 U.S. 816 (1990). The Fifth Circuit recognizes the conflict with *Conner*. (App. 20).[11]

The Fifth Circuit decision used a process-based balancing test to justify the warrantless entry and seizure in this case. "The ultimate test of reasonableness is fulfilled in this case by the City's adherence to its ordinances and procedures as a prelude to ordering the landowners to abate their nuisance structures." (App. 23-24, 24 n.17). The Fifth Circuit cited *G.M. Leasing v. United States*, 429 U.S. 338, 341, 342 n.5 (1977), in support of its decision that the administrative hearing process provided the basis for finding the entry and seizure to be reasonable under the Fourth Amendment. (App. 19). The Ninth Circuit rejected the argument that the administrative hearings provided to the owner of the premises before the entry and seizure made the actions proper under the Fourth Amendment. The Ninth Circuit rejected the argument because of the lack of any U.S. Supreme Court precedent creating a "process" exception to the warrant requirement citing *Michigan v. Tyler*, 436 U.S. 499 (1978). The Ninth Circuit interpreted *G.M. Leasing Corp.* as support for expressly rejecting the process-based balancing test and held that a warrantless entry and seizure to abate a City defined nuisance violated the Fourth Amendment. *Conner*, 897 F.2d at 1491.

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[11] The Fifth Circuit's previous rule was consistent with *Conner*. In *Price v. City of Junction*, 711 F.2d 582, 592 (5th Cir. 1983), the court of appeals held that a municipal ordinance authorizing entry into private property and seizure of junk motor vehicles after an administrative hearing had to be interpreted as requiring a judicial warrant in order to be constitutional under the Fourth Amendment.

The Ninth Circuit followed the precedent set in *Camara v. Municipal Court*, 387 U.S. 523 (1967) and related cases and rejected the argument that *Camara* applied only to searches. *Conner*, 897 F.2d at 1490. The Fifth Circuit avoided the *Camara* precedent by interpreting it as applying only to administrative searches, not seizures. (App. 16-18).

The Fifth Circuit's decision directly contradicts the reasoning of the United States Court of Appeals for the Eighth Circuit in *Hroch v. City of Omaha*, 4 F.3d 693, 697 (8th Cir. 1993). The Eighth Circuit held, in part, that the entry onto private property and the seizure, through demolition, of an apartment building did not violate the Fourth Amendment because there had been prior judicial oversight of the proposed demolition. The Fifth Circuit's reasonableness test explicitly rejected any need for prior judicial oversight. (App. 13).

The Fifth Circuit's decision directly contradicts the Sixth Circuit's application of *Soldal v. Cook County, Ill.*, 506 U.S. 56 (1992) and *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993), to hold that the code enforcement seizure of an apartment building without prior judicial oversight and absent exigent circumstances, violated both the Fourth Amendment and the due process requirement. "In this case, it was sufficiently clear at the time of the eviction that the Flatfords were entitled to pre-eviction judicial oversight in the absence of emergency circumstances." *Flatford v. City of Monroe*, 17 F.3d 162, 170 (6th Cir. 1994). The Fifth Circuit rejected the need for prior judicial involvement under either the Fourth Amendment or the due process requirement. (App. 13).

The Fourth Amendment issue arises in these cases because of the drastic change in procedures for municipal seizures of substandard buildings worked by federal urban renewal programs, state statutes and local ordinances. Before the 1950s, cities regulated the condition of residential and other buildings through fire codes or other general ordinances. Note, "Municipal Housing Codes," 69 Harv. L. R. 1115, 1116 n.8 (1956). Absent emergencies, municipalities were restricted to the use of judicial process in order to obtain the right to enter private property and seize buildings by demolition. *Crossman v. City of Galveston*, 247 S.W. 810, 813 (Tex. 1923) (cases collected); *Rowland v. State of Florida, ex rel. Martin*, 129 Fla. 662, 176 So. 545 (1937); Dillon, *Commentaries on the Law of Municipal Corporations*, Vol. II, pages 1044-1048 (1911); 39 Am. Jur. Nuisances §§ 77, 117, 183-193 (1942).

The judicial process requirement for municipal demolition cases was a specific application of the general law of nuisance abatement. *Crossman*, 247 S.W. at 813; Mandelker, "Housing Codes, Building Demolition, and Just Compensation: A Rationale For The Exercise of Public Powers Over Slum Housing," 67 Mich. L. R. 635, 639-640 (1969). As a general principle, government action to abate nuisances required a judicial determination before abatement in order to comply with due process. Exigent circumstances or matters of trifling value were exceptions to the due process requirement of a prior judicial determination. Even then, the owner of the property could bring a subsequent suit for damages in which the government would have the burden of proving both nuisance and the appropriateness of the destruction of the property as a remedy. *Lawton v. Steele*, 153 U.S. 133,

140-141 (1894). The courts applied these principles to municipal abatement of hazardous, nuisance buildings. *Crossman*, 247 S.W. at 815, *citing Lawton v. Steele*, 153 U.S. 133 (1894).

Federal urban renewal legislation and funding encouraged cities to begin adopting modern housing codes establishing minimum standards and often providing for administrative determinations and demolition orders. Note, "Municipal Housing Codes," 69 Harv. L. R. at 1116; Note, "Enforcement of Municipal Housing Codes," 78 Harv. L. R. 801, 803-804 (1965); Mandelker, "Housing Codes, Building Demolition, and Just Compensation: A Rationale For The Exercise of Public Powers Over Slum Housing," 67 Mich. L. R. 635, 636-637, 639-640 (1969). Texas, and other states, have now passed statutes specifically allowing municipalities to use administrative processes instead of the judicial process. Annotation: Validity and Construction of Statute or Ordinance Providing for Repair or Destruction of Residential Building by Public Authorities at Owner's Expense, 43 A.L.R. 3d 916 (2000).

The change from judicial abatement to administrative seizures raises the Fourth Amendment seizure issues for the first time. Under the common law, any such non-exigent seizures were pursuant to judicial process. Mandelker, 67 Mich. L. R. at 636-640. The judicial process, in the form of a civil case judgment ordering the demolition of a building, provided the assurance that a neutral magistrate had reviewed the proposed entry and seizure and had determined that the invasion of privacy and property was justified by the law. *Soldal*, 506 U.S. at 71. The removal of the judicial supervision in favor of the non-

judicial, administrative process, creates the need for the judicial warrant or other process under the Fourth Amendment. The issue of the content of the Fourth Amendment's application to these administrative demolition processes affects state and municipal code enforcement proceedings throughout the nation.

Governments at all levels continue to abate other forms of alleged nuisances only through the judicial process. Government entry onto private property in order to seize real or personal property under civil or criminal forfeiture statutes and nuisance abatement proceedings continues to be carried out through prior judicial process. Spector, "Crossing the Threshold: Examining the Abatement of Public Nuisances Within the Home," 31 Conn. L. Rev. 547, 560-561, 564-565 (1999). The Ninth Circuit precedent does not lessen the need for judicial process or serve as precedent for administrative seizures without judicial process before such seizures. *Conner*, 897 F.2d at 1491. The application of the Fifth Circuit precedent would substantially increase the non-judicially supervised power of the federal, state, and local governments to enter and seize private property in a wide range of non-criminal matters. Given the obvious police power interest in such matters as eradicating crime and abating nuisance conditions of any kind, governments following the Fifth Circuit need only appoint an administrative board or provide other non-judicial process that can issue, and enforce, orders to enter and seize private property without any judicial process. This would be a significant expansion of the government's power and a substantial limitation of the rights of property owners.

For example, the judicial padlocking of the home and assessment of a fine for suspected drug activities in a home as a nuisance in *State v. Anthony*, 647 N.E. 2d 1368 (Ohio 1995) could be done by a citizen board using administrative process without infringing either the Fourth Amendment or the Due Process Clause under the Fifth Circuit rationale. (App. 24). A citizen board using non-arbitrary proceedings could order the seizure and sale of an apartment building for suspected drug use without infringing either constitutional process. Under current standards, a judicial process is required. *City of Milwaukee v. Arrieh*, 565 N.W.2d 291 (Wis. Ct. App. 1997), *review denied*, 569 N.W.2d 589, *cert. denied*, 522 U.S. 1092 (1998). If these nuisance abatement proceedings are delegated to an administrative process, the *Conner* rule would require at least a judicial warrant.

2. The Fifth Circuit's decision, unlike the Ninth Circuit's *Conner* decision, is a significant departure from the controlling U.S. Supreme Court precedents set in *Camara v. Municipal Court of San Francisco*, 387 U.S. 523 (1967), *See v. City of Seattle*, 387 U.S. 541 (1967), and *Soldal v. Cook County*, 506 U.S. 56 (1992).

*Camara* held there is one governing principle for the determination of whether an entry onto private property for a search or seizure is unreasonable.

> "Nevertheless, one governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonably unless it has been authorized by a valid search warrant.' " Id. 357 at 528-529.

*See*, applying the standards adopted in *Camara* held:

> "Likewise, we see no justification for so relaxing Fourth Amendment safeguards where the official inspection is intended to aid enforcement of laws prescribing minimum physical standards for commercial premises. As we explained in Camara, a search of private houses is presumptively unreasonable if conducted without a warrant. The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant." *See*, 387 U.S. at 543.

The Fifth Circuit rejected this precedent by claiming that this Court has "expressed an overarching test of reasonableness that is antagonistic to an inflexible warrant requirement." (App. 13). The Fifth Circuit opinion cites no case for the proposition of antagonism to an inflexible warrant requirement before entering private property. There is no such authority and there is no such inflexible warrant requirement. There is the general presumption referred to in *Camara* that, absent special circumstances, a warrantless entry into private property and subsequent seizure of private property is unreasonable. *Camara*, 357 U.S. at 528-529.

For example, this Court just recently analyzed a temporary seizure by preventing a person from entering his mobile home while police sought a warrant to search the

premises. The Court held the seizure was reasonable under the special needs because of exigent circumstances exception to the proposition that the Fourth Amendment usually requires a warrant before such a seizure would be reasonable. One reason supporting the warrantless, temporary seizure was that it was less intrusive than a warrantless entry into the home. *Illinois v. McArthur*, 531 U.S. 326 (2001).

The case cited by the Fifth Circuit in support of its position that the presumptive unreasonableness of a warrantless entry into private or commercial premises has been abandoned by this Court does not express any antagonism to a warrant requirement in such cases. The drug testing in *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995) was not approved under a new textual analysis of the Fourth Amendment but rather as an example of the "special needs" exception to the warrant requirement where such a requirement would unduly interfere with school administration. *Id.* at 653.

The Fifth Circuit's decision adopted a new formula for the balancing of private and public interests in the determination of the Fourth Amendment's requirements. The new formula does not weigh the specific interest in entering without a warrant but rather weighs the privacy interest against the general police power goals of the underlying statutory scheme. (App. 19-20). *Camara* and *See* require that the individual's interest be weighed against the government's interest in proceeding without a warrant, not just against the public interest served by the program. *Camara* and *See* specifically reject the use of the general good purpose of the regulatory scheme as the determining factor in the balance.

> The final justification suggested for warrantless administrative searches is that the public interest demands such a rule: it is vigorously argued that the health and safety of entire urban populations is dependent upon enforcement of minimum fire, housing, and sanitation standards, and that the only effective means of enforcing such codes is by routine systematized inspection of all physical structures. Of course, in applying any reasonableness standard, including one of constitutional dimension, an argument that the public interest demands a particular rule must receive careful consideration. But we think this argument misses the mark. The question is not, at this stage at least, whether these inspections may be made, but whether they may be made without a warrant. . . . In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part on whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search. *Camara*, 387 U.S. at 533.

Warrants are a necessary and tolerable limitation on the right to enter upon and inspect commercial premises. *See*, 387 U.S. at 544.

The Fifth Circuit never mentions, much less weighs, whether the burden of obtaining a warrant would affect the government purpose behind the demolition. The Fifth Circuit considers only the general purpose behind the housing code and the need to enforce the codes through

demolition in appropriate cases. (App. 20-21). This is the same argument rejected in *Camara*. (App. 26-28, dissent).

The Fifth Circuit rejected the reasonableness of a warrant requirement because a judicial warrant under *Camara* can be issued ex parte on the basis of the administrative record without pre- or post-warrant notifications of the City's intended actions. Thus, the warrant would be less protective than existing judicial review in state court. (App. 23). This Court rejected this same argument in *Camara* as unduly discounting the purpose behind the warrant machinery contemplated by the Fourth Amendment. That purpose is not to substitute for a due process hearing but to inform the property owner that a neutral magistrate has reviewed the matter and determined the entry is justified under the regulatory scheme, the limits of the entry and subsequent actions are proper and that the person or persons presenting themselves for entry are in fact authorized to do so. *Camara*, 387 U.S. at 532.

It is correct that a judicial warrant to enter and demolish petitioners' property would have issued on an ex parte basis. But all warrants issue on an ex parte basis. All warrant procedures lack the procedural protections of a criminal or civil trial process. *Cf.* Fed. R. Crim. P. 4(a), (b); Fed. R. Crim P. 41.[12] The truism that the Fourth

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[12] Rule 4. Arrest Warrant or Summons Upon Complaint. (a) Issuance. If it appears from the complaint or from an affidavit or affidavits filed with the complaint, that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. . . . (b) Probable Cause. The finding of probable cause may be based upon hearsay evidence in whole or in part.

Amendment warrant process does not provide due process under the Fifth Amendment is not an argument against enforcement of the Fourth Amendment. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 51-53 (1993).

*Soldal v. Cook County*, 506 U.S. 56, 69 (1992) rejected the argument that the Fourth Amendment did not apply to property interests. The Fifth Circuit followed *Soldal* to the extent of recognizing that the City's entry onto petitioners' property and demolition of their buildings was a seizure under the Fourth Amendment. (App. 8-9). The Fifth Circuit departed from *Soldal* by considering only petitioners' privacy interests in its reasonableness determination. There is no discussion of the weight of the property interests at stake. In addition to the invasion of petitioners' privacy interests by entering the premises with demolition equipment and ordering petitioner Freeman off his own premises, the work crew destroyed petitioners' property, two small apartment buildings. R-8, 62-70. The destruction led to the assessment of $15,610 in costs plus interest against petitioners and the filing of liens on the land for these costs. R-1, 117-118. This was a draconian invasion of plaintiffs' property rights. The failure to balance this invasion of privacy and property interests against the slight inconvenience of obtaining a

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Rule 41. Search and Seizure: (a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a federal magistrate or judge of a state court of record within the district wherein the property or person sought is located, upon request of a federal law enforcement officer or an attorney for the government. . . . (c) Issuance and Contents. (1) Warrant Upon Affidavit. . . . The finding of probable cause may be based upon hearsay evidence in whole or in part.

seizure warrant violates this Court's precedent set in *Camara, See,* and *Soldal.* (App. 25-44).

**Due Process issues**

3. The Fifth Circuit decision that the requirements of due process have been met by the City's non-judicial hearing procedure has the effect of eliminating substantial common-law and traditional protections afforded property owners faced with municipal demolition of their buildings. The decision directly conflicts with the decision of this Court in *Honda Motor Co. v. Oberg,* 512 U.S. 415, 430 (1994) that such a derogation of common law protections is presumptively a violation of due process unless the state can show it has provided a constitutionally adequate substitute procedure. The question of the derogation of the common law protections is important because of the widespread use of statutory procedures to eliminate the common law protection afforded property owners in most states. Mandelker, 67 Mich. L. R. at 636-640.

*Honda* held that statutory abrogation of a well-established common law requirement for judicial review as a protection against arbitrary deprivations of property raises a presumption that the procedures violate the Due Process Clause. 512 U.S. at 430. Traditional practice provides one guideline for constitutional due process. When the statutes remove such traditional procedures that would have provided protection against arbitrary deprivations of property, this Court has not hesitated to find the new proceedings violate due process. Id. The Fifth Circuit, without discussion of *Honda,* dismissed the traditional due process requirement of judicial process in the municipal

abatement of nuisance buildings as a "jurisprudential artifact, interesting but not controlling." (App. 13).

The Fifth Circuit's unequivocal rejection of the proposition that due process requires a judicial determination before the City can seize real property through the administrative code enforcement demolition process is also in direct conflict with two state courts of last resort, the Texas Supreme Court and the Georgia Supreme Court.

The controlling precedent of the Texas Supreme Court is *Crossman*, 247 S.W. at 810.[13] *Crossman* held that a judicial determination must precede a municipal demolition of an allegedly substandard building on several grounds. The constitutional requirement of due process was one ground for the decision. The Texas Supreme Court reasoned that given the interests at stake, real property ownership, a judicial determination of the facts of the existence of a nuisance and the appropriateness of demolition as a remedy for a nuisance was necessary for due process. *Id.* at 812, 813.

The controlling precedent of the Georgia Supreme Court is *Shaffer v. City of Atlanta*, 154 S.E.2d 241, 243 (Ga. 1967). The court succinctly held that the municipal order demolishing the property without a judicial determination was unconstitutional. "If the City desires him to demolish the property without giving him the right to correct any and all deficiencies found in a judicial hearing

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[13] *Crossman* was followed in *City of Texarkana v. Reagan*, 247 S.W. 816 (Tex. 1923); *City of Houston v. Lurie*, 224 S.W.2d 871 (Tex. 1949); *Manchester Terminal v. Texas Marine Transportation*, 781 S.W.2d 646, 650 (Tex. Civ. App. Houston 1st District 1990); *Hart v. City of Dallas*, 565 S.W.2d 373 (Tex. Civ. App. Dallas 1978).

of whether or not a nuisance exists under Code § 72-40, then let the property be condemned and pay him for it, but not through indirect means prevent him from abating an alleged nuisance before a trial thereon."

Petitioners are not arguing that administrative or other quasi-judicial processes cannot provide due process in many situations. Modern due process law has long abandoned any support for such a position. *Morgan v. U.S.*, 304 U.S. 1, 32, 36 (1938). Modern due process law does require that the administrative process to be substituted for a judicial process must comport with the full, open, and fair hearing standards that are at the heart of the judicial process. *Id.* at 36. The details of the process that is due are determined by the *Mathews v. Eldridge*, 424 U.S. 319, 332-349 (1975) balancing test. But given the overriding importance of property rights in our system, government seizures of property are given the highest weight in the due process calculus. For example, an interim seizure of real property under forfeiture statutes requires both a Fourth Amendment warrant and a pre-deprivation due process hearing. *U.S. v. James Daniel Good Real Property*, 510 U.S. 43, 53-54 (1993). The prejudgement seizure of real property through attachment proceedings requires a pre-deprivation judicial determination. *Connecticut v. Doehr*, 501 U.S. 1, 11-12 (1991). The Texas and Georgia Supreme Courts have weighed the interests at stake in the municipal demolition of substandard properties. These courts determined that the private interest at stake, ownership and the incidents of ownership of real property, demanded nothing less than full judicial process as a matter of due process. The Fifth Circuit did no such balancing but rejected the right to judicial process as an outmoded, historic relic. App. 13.

The City of Dallas has chosen to adopt and implement an administrative process that is far from the full, open, and fair hearing standards that are at the heart of the judicial process. The City staff presents its case to the URSB on an ex parte basis, before the hearing. R-1, 111. Neither the City staff nor the URSB disclose the documents or other evidence considered by the URSB to the property owner. R-1, 109-111. Neither the pre-hearing notice nor the post-decision order provide any facts about the alleged substandard, hazardous, or annoying conditions. R-1, 85, 99, 113. These procedures violate basic due process rights. *Simmons v. U.S.*, 348 U.S. 397, 404 (1963). The process does not provide the full and fair hearing that would be a constitutionally adequate substitute for the judicial process *Morgan*, 304 U.S. at 32, 36. The Fifth Circuit failed to follow this Court's ruling in *Honda*, 512 U.S. at 430 by finding that the administrative process was constitutional.

## CONCLUSION

The petition for the grant of the writ of certiorari should be granted.

Respectfully submitted,

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REVISED – March 5, 2001

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-10907

CHARLES FREEMAN and ROSALYN BROWN,

Plaintiffs-Appellees-Cross-Appellants,

v.

CITY OF DALLAS,
Defendant-Appellant-Cross-Appellee.

Appeal from the United States District Court for the Northern District of Texas

February 22, 2001

Before JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, BENAVIDES, STEWART, PARKER and DENNIS, Circuit Judges.*

EDITH H. JONES, Circuit Judge:

The City of Dallas served notices on the owners of two vacant, deteriorated apartment houses, warning them to repair or demolish the structures. The owners fought the order according to City procedures but lost. After the City tore down the condemned buildings, the owners filed suit in federal court alleging violations of the Fourth Amendment and the Due Process Clause. A divided panel of this court held that although the City procedures complied with due process, the City must also obtain a pre-demolition warrant of some sort in order to

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* Chief Judge King did not participate in this decision.

satisfy the Fourth Amendment. This court, sitting en banc, disagrees with the panel majority's interpretation of the Fourth Amendment and denies relief to the property owners. A warrant is unnecessary when a municipality seizes property that has been declared a nuisance by means of established police power procedures.

I.

Between December 1992 and April 1993, Rosalyn Brown acquired two vacant, eight-unit apartment buildings in Dallas, Texas located at 2621 and 2611 Meyers Street. Brown paid $10.00 for the first building and $1.00 for the second, which had suffered fire damage prior to purchase. On August 11, 1994, Brown transferred a one percent undivided interest in both buildings to her brother, Charles Freeman. The buildings remained vacant during the entire period of plaintiffs' ownership.

Brown intended to rent the apartment units after making repairs. To this end, she asked Freeman to be the general contractor in charge of renovating the apartments. Freeman was neither a registered engineer or architect, nor did he possess a general contractor's license or trade license from the State of Texas. No construction company or crew worked for him.

In April and July of 1993, inspectors from the Dallas Department of Housing and Neighborhood Services (the "Department") cited the plaintiffs' two apartment buildings for non-compliance with the City's Minimum Urban Rehabilitation Standards Code (the "Code"). According to the Department's inspectors, the buildings together needed nearly $200,000 in repairs to comply with the

Code. When the Code violations were not corrected, the Department referred the matter to the Urban Rehabilitation Standards Board ("URSB") and recommended demolition.

The URSB was established by the City of Dallas to determine whether property condition reports filed by city inspectors identify violations of the City's building codes. The URSB comprises thirty private citizen members (and eight alternates) who are appointed by the Dallas City Council. The URSB may determine, after a hearing, whether a given structure is an "urban nuisance" and take various remedial measures. The URSB is authorized by city ordinance to order repairs, receivership, the closing and vacating of buildings, demolition, and civil penalties of up to two thousand dollars a day against property owners who fail to repair or demolish a structure after the board has issued a valid determination and remedial order. Dallas, Tex., Code ch. 27, art. II, § 27-8.

The URSB functions through hearing panels composed of members of the URSB. The Dallas City Code establishes the procedure to be used by the panels. At a hearing, "an owner, lessor, occupant, or lienholder may present witnesses in his own behalf and is entitled to cross-examine any witnesses appearing against him." Dallas, Tex., Code ch. 27, art. II, § 27-9(c). The decision of the hearing panel is final except that rehearings may be granted in certain instances. The code also gives an affected property owner an absolute right to appeal the panel decision to state district court. Dallas, Tex., Code ch. 27, art. II, § 27-9(e). Under state law, the court considers whether the landowner's substantial rights have

been prejudiced because the URSB decision violates constitutional or statutory law; exceeds URSB's authority; is based on unlawful procedure or any other error of law; is unsupported by substantial evidence; or is arbitrary or capricious or an abuse of discretion. TEXAS GOV'T CODE § 2001.174(2).

After receiving the Department's reports on plaintiffs' properties, the URSB conducted a title search and mailed a notice of hearing on each of the properties to the owner of record.[1] The notice announced that the URSB might order demolition to remedy the Code offenses. It further stated that the property owner would "be given an opportunity to present evidence and witnesses if so desired."

In preparation for the hearings, Department staffers briefed the panel of URSB members assigned to decide the fate of the Meyers Street properties. They provided the panel members with information on the properties, including repair cost estimates, and accompanied some of them on a tour of the premises.

Freeman appeared at the hearings, identifying himself as the "attorney-in-fact for Brown" and as an owner

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[1] Freeman did not get notice because he had no interest in either property at this time. Brown received a notice on 2621 Meyers Street, the property of which she was the owner of record. Brown did not receive notice on the 2611 Meyers Street property because, although she had purchased the property by this date, she had not yet filed a warranty deed. Instead, the notice on 2611 Meyers Street was sent to the owner of record, Robert Burkhead.

of 2611 and 2621 Meyers Street. The panel looked at pictures of the structures, questioned Freeman about his plans for repair, and asked whether he had the funds for repair. Freeman testified that he lacked funds at present and asked for more time to make repairs. Expressing doubt about Freeman's ownership and his ability to finance repairs, the panel unanimously voted to demolish each apartment building as an urban nuisance.[2]

Following the hearing, Freeman signed notices of demolition for both apartment buildings. He then asked for and received a rehearing from the URSB. Two panel members visited the properties before the rehearings.

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[2] The Code defines an "urban nuisance" as the following:

> [A] premises or structure that:
>
> (A) is reasonably dangerous to the physical health or safety of an occupant or other person; or
>
> (B) because of violations of [the Code] . . . , its state of disrepair is such that it could reasonably cause injury, damage, harm, or inconvenience to a considerable portion of the community in the use and enjoyment of property, materially interfering with the proper use or comfort and enjoyment of surrounding property, taking into consideration the nature and use of the properties in the area and the character of the community in which they are situated, which condition would be substantially offensive and annoying to persons of ordinary sensibilities, tastes, and habits living in the community.

Dallas, Tex., Code ch. 27, art. I, § 27-3(23).

The Code goes on to prescribe with specificity the minimum structural, health and utility standards whose breach may result in the declaration of an urban nuisance. Dallas, Tex., Code ch. 27, Art. III, § 27-11.

They examined the exterior of the apartment building at 2611 Meyers Street. At 2621 Meyers Street, they ran into Freeman. He showed them repairs he had made inside that property, and they told him to bring pictures of these repairs to the rehearings.

At the rehearing, the Department showed pictures of the apartment buildings' exteriors. In response, Freeman testified that he thought he could acquire most of the repair materials at little or no cost. He further stated that he hoped to finance repairs through a loan from the City; he had received a commitment from relatives in the construction business to help him make repairs if he received a City loan.

Freeman also submitted pictures of one unit in the 2621 Meyers Street building that he had repaired, and he presented a list of repair materials that he had already collected. He further testified that he could renovate each unit at 2621 Meyers Street for $2000. Though panel members reacted skeptically and reminded him of the Department's repair cost estimates, Freeman did not inquire about the basis for these estimates nor did he ask to question the Department officials responsible for them.

The panel again voted to demolish plaintiffs' buildings. The vote was unanimous on the 2611 Meyers Street property and was split five to two on the 2621 Meyers Street property. Freeman received a notice of demolition for each property at the end of the rehearing, and he signed them. The notice advised that the panel's decision could be appealed within twenty days to state district

court for review. Freeman and Brown did not appeal the URSB decision to state district court.[3]

When Brown and Freeman failed to demolish the buildings within thirty days, the City hired a contractor to do the work. The two vacant structures were demolished in late December 1994, and the costs of the demolition were assessed against Freeman and Brown in the total amount of about $16,000.

A year and a half later, Freeman and Brown filed suit against the City of Dallas under 42 U.S.C. § 1983. They alleged that the demolition of their apartment buildings without first obtaining a judicial warrant constituted an unreasonable seizure in violation of the Fourth Amendment. They also alleged that the URSB's procedure for condemning and demolishing their apartment buildings and for imposing liens on the remaining realty denied them procedural due process in violation of the Fifth and Fourteenth Amendments.

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[3] The URSB also sent notice of the order to demolish the building at 2611 Meyers Street to Freeman and notice of the order to demolish the building at 2621 Meyers Street to Freeman and Brown. The notices stated, in part:

> If you do not demolish the structure(s) within the time above indicated [30 days], the city will arrange to have this work done and the expense of that demolition performed under contract with the city will constitute a lien on the real property on which the structure(s) were located, and that lien will run with the land.

These notices were sent to the same addresses at which Brown and Freeman had received mail about earlier hearings, but they were returned as "Unclaimed."

Freeman and Brown moved for summary judgment on the Fourth Amendment claim while the City moved for summary judgment on all claims. The district court granted the plaintiffs' motion on the Fourth Amendment claim and granted the City's motion on the Due Process claims. Following a one-day trial on damages for the Fourth Amendment violation, the district court accepted the jury's verdict and entered final judgment against the City of Dallas in the amount of $20,000 plus interest.

A divided panel of this Court affirmed the district court's summary judgment for the property owners with respect to the Fourth Amendment claim, while also affirming the rejection of the plaintiffs' Due Process claims.[4] *See Freeman v. City of Dallas*, 186 F.3d 601 (5th Cir. 1999), *reh'g en banc granted*, 200 F.3d 884 (5th Cir. 1999). We granted rehearing en banc to reconsider the Fourth Amendment ruling.

## II. DISCUSSION

The panel majority reasoned toward a violation of the Fourth Amendment in three steps. First, the demolition of the Freemans' apartment houses was a "seizure" for Fourth Amendment purposes. Second, the seizure had to be preceded by a warrant. Third, a warrantless seizure, even if it occurred following constitutionally adequate local condemnation procedures, is unreasonable and therefore unconstitutional. While we agree that the City

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[4] This court reinstates the panel opinion concerning the Due Process claims.

seized the Freemans' real property for demolition,[5] we do not accede to the panel majority's inflexible warrant requirement in this context or its supplanting of the Fourth Amendment reasonableness inquiry with such a requirement. The text of the Fourth Amendment conspicuously fails to require a warrant for every government search or seizure. And the controlling caselaw emphasizes reasonableness, a balancing of governmental versus private interests, as the touchstone of the Fourth Amendment.

Since the relevant facts are undisputed, summary judgment was granted on the merits as a matter of law, *see* Fed. R. Civ. P. 56(c). We review the district court's decision de novo. *See United States v. Johnson*, 160 F.3d 1061, 1063 (5th Cir. 1998).

The Fourth Amendment, made applicable to the States by the Fourteenth Amendment, *Ker v. California*, 374 U.S. 23, 30, 83 S. Ct. 1623, 1628 (1963), declares:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be

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[5] "Seizure" of property occurs when there is some meaningful interference with an individual's possessory interests in that property, *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 1656 (1984), and a "seizure" may occur in both civil and criminal contexts. There can be no question that the city's actions against the Freeman's apartment buildings constituted a "seizure". *See Soldal v. Cook County, Ill.*, 506 U.S. 56, 62 & n.7, 113 S.Ct. 538, 544 & n.7 (1992), (holding that the forcible removal of a mobile home, leaving the owners dispossessed, constituted a "seizure" under the Fourth Amendment).

> violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This provision contains two separate and independent clauses. The first proscribes "unreasonable searches and seizures," and the second prescribes the narrow conditions under which a warrant may issue. Nothing in the text suggests that warrants are required for every search or seizure, nor is the existence of a warrant a sine qua non for a reasonable search or seizure. While the text plainly mandates reasonableness in the seizure, it does not instruct whether a warrant is necessary to ensure the reasonableness of the City's demolition order.

To determine the necessity of a warrant here, we might consider common law at the time the Fourth Amendment was adopted, *see Wyoming v. Houghton*, 526 U.S. 295, 299, 119 S. Ct. 1297, 1300 (1999), but, contrary to plaintiffs' assertions, the quest would be fruitless. Confusing the demands of due process with the warrant clause, plaintiffs' historical argument observes that, at common law, apart from cases where a nuisance posing an imminent danger could be summarily abated by self-help, structures were ordinarily determined to be nuisances in criminal or civil abatement actions. Because the courts at the time of the framing of the Constitution oversaw nuisance law, plaintiffs assume that they must continue constitutionally to play a role under the aegis of the Warrant Clause. There are two serious flaws in this argument. First, none of the cases cited by the plaintiffs

deals with warrants.[6] Instead, cases from the nineteenth century involved judicial review to determine whether structures or activities were in fact injurious under state and local police power.[7] Other cases evaluated nuisance determinations by the standards of procedural and substantive due process.[8] Whatever these cases may imply

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[6] The federal government lacked authority over nuisances at and after the time of the framing, and the Fourth Amendment was not first applied to the states until 1961. *Mapp v. Ohio*, 367 U.S. 643, 646-47, 81 S.Ct. 1684, 1686-87 (1961).

[7] *See Yates v. Milwaukee*, 77 U.S. 497, 505, 19 L.Ed. 984 (1870) ("It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws either of the city or of the State, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself."); *Hennessy v. St. Paul*, 37 F. 565, 566 (C.C. Minn.1889) ("[U]nless a nuisance, as defined by the common law or by statute, exists, the act of the common council cannot make it one by a mere resolution. Such a doctrine might place the property of the people, no matter what in fact might be its real condition and character, at the disposal of the common council, without compensation."); *Underwood v. Green*, 42 N.Y. 140 (N.Y. 1870); J.E. Macy, Annotation, *Constitutional Rights of Owner as Against Destruction of Building by Public Authorities*, 14 A.L.R.2d 73, *8 (1950) ("[N]either at common law nor under such express power can it, by its mere declaration that specified property is a nuisance, make it one when in fact it is not.").

[8] *See, e.g., Lawton v. Steele*, 152 U.S. 133, 141, 14 S.Ct. 499, 502 (1894) ("If the property were of great value . . . it would be putting a dangerous power in the hands of a custom officer to permit him to sell or destroy it as a public nuisance, and the owner would have good reason to complain of such act as depriving him of his property without due process of law."); *Mugler v. Kansas*, 123 U.S. 623, 8 S.Ct. 273, 301 (1887) ("The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a

about the historical view of the reasonableness of particular nuisance decisions, they say nothing about employing the Warrant Clause to review those decisions.

Second, the plaintiffs theorize that because nuisance determinations historically involved judicial procedures, such determinations can only be "reasonable" today if they are subject to plenary court review. This theory is fundamentally at odds with the development of governmental administrative agencies. Characteristically, agency decisions are deferred to by the courts. Plaintiffs apparently seek, however, to broaden courts' involvement in nuisance decision-making contrary both to the deferential standard of judicial review of administrative decisions and to the broad standards for issuance of warrants. None of the decisions produced by plaintiffs justifies reverting to the 18th century judicial role in nuisance abatement. This court's comment in rejecting, over

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particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law."); *Our House v. The State*, 4 Greene 172, 1853 WL 221, *2 (Iowa 1853) (holding that a law declaring "dram shops" to be public nuisances, authorizing their abatement, and establishing certain procedures for notice and a hearing "does not deprive a person of his property without due process of law"). The notion of substantive due process survives in challenges to municipal zoning and nuisance decisions, as this court has recently held. *John Corp. v. City of Houston*, 214 F.3d 573, 581-86 (5th Cir. 2000) (allegation that city deprived landowners of property by allowing demolition under unconstitutionally vague ordinance states cognizable substantive due process claim).

twenty-five years ago, a similar argument for reinstituting common law judicial review of nuisance determinations bears repeating:

> [F]or the purposes of marking the limits of federal constitutional due process the common law of nuisance must be considered a jurisprudential artifact, interesting but not controlling.

*Traylor v. City of Amarillo*, 492 F.2d 1156, 1159 (5th Cir. 1974) (Goldberg, J.). Even more emphatically, the common law of nuisance affords no basis for creating a per se judicial warrant requirement that is redundant of procedural and substantive safeguards inherent in modern administrative law and explicit municipal nuisance ordinances.

Where history yields no firm answer, a search or seizure must be evaluated under traditional standards of reasonableness. *Wyoming*, 526 U.S. at 300, 119 S. Ct. at 1300. There is no Supreme Court caselaw directly on point. Still, the Court has expressed an overarching test of reasonableness that is antagonistic to an inflexible warrant requirement. Thus, the reasonableness standard is one that reflects a " 'careful balancing of governmental and private interests.' " *Soldal*, 506 U.S. at 71, 113 S. Ct. at 549, (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 341, 105 S. Ct. 733, 742 (1985)). More recently, the Court reiterated, "as the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a government search is reasonableness." *Vernonia School Dist. 47J v.*

*Acton*, 515 U.S. 646, 652, 115 S. Ct. 2386, 2390 (1995).[9] Vernonia also clearly distinguishes between the reasonableness of government searches and the warrant requirement:

> Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, this Court has said that reasonableness generally requires the obtaining of a judicial warrant. Warrants cannot be issued, of course, without the showing of probable cause required by the Warrant Clause. But a warrant is not required to establish the reasonableness of all government searches; and when a warrant is not required (and the Warrant Clause therefore not applicable), probable cause is not invariably required either.[10]

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[9] *See also City of Indianapolis v. Edmond*, 121 S.Ct. 447, 4451 (2000) ("The Fourth Amendment requires that searches and seizures be reasonable."); *Ohio v. Robinette*, 519 U.S. 33, 39, 117 S.Ct. 417, 421 (1996) ("the touchstone of the Fourth Amendment is reasonableness") (internal quotations omitted); *Whren v. United States*, 517 U.S. 806, 817, 116 S.Ct. 1769, 1776 (1996) ("It is of course true that in principle every Fourth Amendment case, since it turns upon a reasonableness determination, involves a balancing of all relevant factors.") (quotations omitted); *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed. 930 (1967) ("[R]easonableness is still the ultimate standard [under the Fourth Amendment]."); *Carroll v. United States*, 267 U.S. 132, 147, 45 S.Ct. 280, 283, 69 L.Ed. 543 (1925) ("The Fourth Amendment does not denounce all searches and seizures, but only such as are unreasonable.").

[10] The Court goes on in the same paragraph of *Vernonia* to state that:

> A search unsupported by probable cause can be constitutional, we have said, 'when special needs, beyond the normal need for law enforcement, make

*Vernonia*, 515 U.S. at 653, 115 S. Ct. at 2390-91 (emphasis added) (citations omitted). Under these decisions, the fundamental inquiry, which we will address in detail later, is the reasonableness of the City's seizure.

The property owners contend, however, and this court's panel opinion held that, the seizure of their property was per se unreasonable unless the City obtained a warrant to enforce its demolition order. In support of this position, plaintiffs and the panel majority rely on a handful of cases. Their reliance is misplaced.

In companion cases, the Court did extend a warrant requirement of a sort to administrative inspections of private homes and business properties, the purpose of which was to verify compliance with municipal health and safety codes. *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 87 S. Ct. 1727 (1967); *See v. City of Seattle*, 387 U.S. 541, 87 S. Ct. 1737 (1967). Evidence of code violations uncovered by the warrantless searches might lead to fines or other penalties. Balancing the need for searches against the property owners' privacy, the Court concluded that warrants were necessary to check the unfettered discretion code enforcement officers had in the field. A property owner had "no way of knowing

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> the warrant and probable-cause requirement impracticable'.

515 U.S. at 653, 115 S.Ct. at 2391. By its terms, and by the Court's further explanation, the "special needs" caveat tends to expand rather than narrow exceptions to the warrant requirement. Further, "special needs" are relevant to relaxation of the probable-cause basis for a government search for evidence. Here, however, there is probable cause for the City's seizure.

whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization." *Camara*, 387 U.S. at 532. Only with the protection of an administrative warrant would property owners avoid capricious or overbroad searches.

*Camara* and *See* are distinguishable from this case. First, since searches to gather evidence of regulatory noncompliance invade citizens' privacy "without particularized suspicion of misconduct,"[11] they need only satisfy standards of administrative reasonableness. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320, 98 S. Ct. 1816, 1824 (1978) (requiring only administrative reasonableness for regulatory searches); *Griffin v. Wisconsin*, 483 U.S. 868, 877 n.4, 107 S. Ct. 3164, 3170 n.4 (1987) (requiring only administrative reasonableness for regulatory searches). Here, the evidence of municipal code violations had already been obtained by means unchallenged by the landowners, and the administrative adjudication of noncompliance has occurred. The landowners availed themselves of two hearings resulting in a decision of the seven-member panel of the URSB, and after these proceedings, there remained a possibility of state court judicial review. What is sought by these plaintiffs is not protection against an unregulated search for evidence of wrongdoing, but additional protection to forestall the result of already-determined wrongdoing.

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[11] *City of Indianapolis v. Edmond*, ___ U.S. ___, 121 S.Ct. 447, 451 (2000).

Second, the URSB, unlike the field code inspectors in *Camara* and *See*, could not operate with unbridled discretion. The municipal code specifies grounds on which a building may be determined to be a public nuisance.[12] The property owners' right to defend the case against their apartment buildings was procedurally secure. Only by impugning the institutional integrity of the URSB can one arrive at the conclusion, unsupported in this record, that it exercised standardless discretion and either arbitrarily enforced the municipal code or failed to consider the property owners' evidence. The nature of the URSB's adjudicative function[13] imposes more numerous and more transparent constraints on the URSB than did the evidence-gathering function performed by field officers randomly inspecting private buildings in *Camara* and *See*.

Third, it is hard to understand what protection the *Camara*-approved administrative warrant would provide for these plaintiffs. *Camara* relaxed the probable cause standard for issuance of such warrants, requiring only a more general determination that "legislative or administrative standards for conducting an area inspection" be reasonable. *Camara*, 387 U.S at 538, 87 S. Ct. at 1735-36. *Camara*-style administrative search warrants need not be issued by judicial officers. *See Griffin v. Wisconsin*, 483 U.S. 868, 877 and n.5, 107 S. Ct. 3164, 3170 and n.5 (1987).

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[12] See *supra* note 2.

[13] The Texas Local Government Code describes the agencies like the URSB as exercising "Quasi Judicial Enforcement of Health and Safety ordinances." Subchapter C, Texas Local Gov't. Code, Tit. 2, Subtitle D, Ch. 54 (§§ 54.032-54.042).

Plaintiffs also admit that administrative search warrants may be issued ex parte. While the Court's standards may meaningfully constrain officials who enter private property for inspection purposes, they are obviously ill-suited to regulate completed administrative condemnation proceedings. If a warrant of some type is to be imposed in lieu of state judicial review, it must be on terms different from the *Camara* warrants in order to assist these landowners. But if the terms are different, then a different justification is necessary.

*Camara* and *See* thus doubly fail to support the plaintiffs' argument. Those cases imply either that seizure of the apartment buildings was preceded by reasonable, rigorous procedures that protected the property owners' rights, or they mandate an ex parte, possibly nonjudicial administrative warrant shorn of probable cause, which does the property owners no good. While useful in their sphere, these cases fail to support a warrant following a completed nuisance abatement procedure.

The landowners have also cited *Soldal* in support of their warrant argument, but *Soldal* is not even a warrant case. The only issue decided by *Soldal* was whether the nonjudicial eviction-by-relocation of the tenants' mobile home, with sheriffs' deputies assisting, constituted a seizure within the Fourth Amendment. The Court refused to consider whether the seizure was constitutionally reasonable, as it stated:

> Whether the [4th] Amendment was in fact violated is, of course, a different question that requires determining if the seizure was

> reasonable. That inquiry entails the weighing of various factors and is not before us.

*Soldal*, 506 U.S. at 62, 113 S. Ct. at 543.

In the final case offered by plaintiffs, the Supreme Court held that the IRS must obtain a warrant to search private premises to locate property that may be seized to enforce a valid federal tax lien. *GM Leasing Corp. v. United States*, 429 U.S. 338, 97 S. Ct. 619 (1977). More significantly for present purposes, the Court distinguished a search for unidentified nonexempt property from a seizure, and it rejected requiring a warrant for seizures of the taxpayer's vehicles from property where the seizures "did not involve any invasion of privacy." 429 U.S. at 351, 97 S. Ct. at 628. Similarly in this case, the plaintiffs retained little or no reasonable expectation of privacy in their dilapidated, uninhabited rental properties after the URSB had entered orders declaring them an urban nuisance, and the owners had failed to abate the code violations.

*GM Leasing* also states that where seizures are sustainable under the Due Process Clause, constitutional analysis of the same acts under the Fourth Amendment "is similar and yields a like result." *Id.* at n.18. Texas's administrative condemnation procedures have withstood due process challenge. *Traylor v. City of Amarillo*. 492 F.2d 1156 (5th Cir. 1974). Far from supporting the plaintiffs, *GM Leasing* thus forecasts, even if it does not compel, that a balancing of the public and private interests at stake will favor the public interest in nuisance abatement after the conclusion of adequate administrative proceedings.

Not only does plaintiffs' theory lack support in Supreme Court caselaw, but it enjoys only minority support among the federal circuits. The Eighth and Sixth Circuits have found no Fourth Amendment bar to warrantless condemnation and eviction proceedings, where satisfactory administrative procedures preceded them. *Samuels v. Meriwether*, 94 F.3d 1163 (8th Cir. 1996); *Hroch v. City of Omaha*, 4 F.3d 693 (8th Cir. 1993); *Flatford v. City of Monroe*, 17 F.3d 162, 170 (6th Cir. 1994). On the other hand, a divided panel of the Ninth Circuit held that a warrant was necessary before city officials could enter private property to seize previously-condemned automobiles. *Conner v. City of Santa Ana*, 897 F.2d 1487, 1495 (9th Cir. 1990). We disagree with *Conner* for reasons stated in Judge Trott's dissent, 897 F.2d at 1494-98, and based on our evaluation of Fourth Amendment reasonableness.

Although the City did not have to obtain a warrant to effectuate a valid seizure and demolition of the nuisance structures, the fundamental Fourth Amendment question of reasonableness remains, a question decided by balancing the public and private interests at stake.

As the Supreme Court has acknowledged, "the public interest demands that all dangerous conditions be prevented or abated." *Camara*, 387 U.S. at 537, 87 S. Ct. 1735. Regulation of nuisance properties is at the heart of the

municipal police power.[14] It is eminently reasonable for a city to prescribe minimum property maintenance standards to protect the public and to maintain adjacent land values. Nevertheless, a city may not arbitrarily enter abatement orders or declare the existence of nuisances with no underlying standards. Texas law forbids such actions,[15] and the City's ordinance exemplifies the state statutes' criteria. Contrary to the landowners' argument, Dallas's minimum standards for property owners assure structural soundness, public health and safety and human habitability. The Dallas ordinance is not concerned with aesthetic or non-functional values. The ordinance falls well within the City's police power and thus within a sphere that courts have traditionally been reluctant to invade.

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[14] While the Supreme Court has not specifically defined the scope of the police power, it has reaffirmed the "classic statement" of the rule:

> 'To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.' Even this rule is not applied with strict precision, for this Court has often said that 'debatable questions as to reasonableness are not for the courts but for the legislature. . . . '

*Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594-95, 82 S.Ct. 987, 990 (1962) (citations omitted).

[15] *See generally*, Tex. Loc. Govt. Code, Tit. 2, Subtitle D, ch. 54.

Prescription of standards necessitates their enforcement, and it is also reasonable that nuisance abatement be one of the enforcement mechanisms available to the City. While abatement is permissible, however, the City ordinance affords property owners the opportunity to contest the determination of non-compliance, to repair their property, or to seek other remedies. Dallas's procedures include reasonable notice to and time limits upon landowners' actions, multiple hearing possibilities, flexible remedies, and judicial review in state court under typical criteria for review of administrative actions.[16] That these standards comport with due process suggests the Fourth Amendment reasonableness of the URSB's final remedial orders.

With regard to the landowners' interests, the Fourth Amendment protects only those expectations of privacy that society recognizes as "legitimate". *New Jersey v. T.L.O.*, 469 U.S.325, 338, 105 S. Ct. 733, 741 (1984). "What expectations are legitimate varies, of course, with context . . . [and] . . . may depend upon the individual's legal relationship with the State". *Vernonia*, 515 U.S. at 654, 115 S. Ct. at 2391. Because the Dallas nuisance standards are straightforward and the administrative procedure is adequate, these property owners' expectation of privacy in the nuisance structures after the remedial orders became final was severely diminished. As vacant commercial

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[16] Indeed, the grounds for state court judicial review are nearly identical to those standards employed historically by courts in reviewing nuisance decisions, *i.e.* the decisions on which plaintiffs seek to build the edifice of their warrant requirement.

properties, the structures were not subject to the same degree of privacy protection as non-business property. *New York v. Burger*, 482 U.S. 691, 700, 107 S. Ct. 2636, 2642 (1987); *O'Connor v. Ortega*, 480 U.S. 709, 725, 107 S. Ct. 1492, 1501 (1987). Further, nearly a year had passed since the plaintiffs were informed of their structures' non-compliance. While they did defend themselves before the URSB, they made no significant progress in remedying violations whose total repair cost was nearly $200,000. Whereas the landowners in *Soldal* were the victims of non-judicial eviction without prior notice, these plaintiffs had ample notice and a full panoply of administrative remedies. Finally, since the rent properties were uninhabited, the demolition, unlike the eviction carried out in *Soldal*, did not invade anyone's personal privacy.

Requiring an administrative warrant of some sort after the URSB proceedings would not have enhanced the landowners' security or privacy. A *Camara* warrant could be sought *ex parte*; it could be obtained solely on the basis of the completed administrative record; no requirements of pre- or post-warrant notification of the City's intended actions were necessary. If the purpose of a warrant is to obtain some neutral review of the URSB orders, this procedure is less protective of the landowners than existing judicial review in state court.

The ultimate test of reasonableness is fulfilled in this case by the City's adherence to its ordinances and procedures as a prelude to ordering the landowners to abate

their nuisance structures.[17] The Supreme Court originally extended an administrative warrant requirement to civil investigations because "the basic purpose of [the Fourth] Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara*, 387 U.S. at 528, 87 S. Ct. at 1730 (emphasis added); *see also Marshall*, 436 U.S. at 312, 98 S. Ct. at 1820. Whatever else the City's enforcement of its municipal habitation code might be, it is sufficiently hedged about by published standards, quasi-judicial administrative proceedings, and flexible remedies that it is not arbitrary. In the context of reviewing civil administrative and regulatory enforcement of laws enacted pursuant to the traditional police power, Fourth Amendment reasonableness means non-arbitrariness. The Fourth Amendment was not violated here.[18]

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[17] In reaching this conclusion, we do not ignore *Soldal*'s mandate that a particular government action may implicate more than one constitutional provision. *Soldal*, 506 U.S. at 70, 113 S.Ct. at 538. A particular nuisance determination might be reviewable under the Takings Clause or Substantive Due Process as well as the Fourth Amendment or Procedural Due Process standards. *John Corp. v. City of Houston*, 214 F.3d 573 (5th Cir. 2000). But the Fourth Amendment reasonableness of a seizure and demolition of nuisance property will ordinarily be established when the substantive and procedural safeguards inherent in state and municipal property standards ordinances have been fulfilled. *See Samuels*, 94 F.3d at 1168.

[18] *Cf. Soldal*, 506 U.S. at 71, 113 S.Ct. at 549 ("Assuming . . . that the [evicting] officers were acting pursuant to a court order . . . a showing of unreasonableness would be a laborious task indeed."). Likewise, we believe a showing of unreasonableness in the face of the City's adherence to its ordinance is a "laborious task indeed."

## CONCLUSION

For all these reasons, we conclude that the seizure and demolition of the plaintiffs' apartment buildings, after those structures were condemned according to City ordinance and state law, were reasonable under the Fourth Amendment. The judgment against the City is **REVERSED**.

DENNIS, Circuit Judge, with whom WIENER, BENAVIDES and STEWART, Circuit Judges, join in Part I only, dissenting:

The en banc majority reaches the conclusion that, while binding Supreme Court precedent interpreting the Fourth Amendment's proscription of unreasonable searches would clearly require the URSB to secure a warrant from a neutral judicial officer to conduct an inspection of the two apartment buildings in the absence of consent or exigent circumstances, the Fourth Amendment's proscription of unreasonable seizures, as illumined by the same and additional Supreme Court precedent, does not require the URSB to secure such a warrant before demolishing the same apartment buildings. Unable to square this anomalous result with the language of the Fourth Amendment or Supreme Court jurisprudence, I dissent.

## I. FOURTH AMENDMENT

### A. *Camara, Soldal,* and *Freeman*

The *Freeman* panel majority holding that the URSB violated the owners' Fourth Amendment rights correctly

follows the Supreme Court's Fourth Amendment decisions in *Soldal v. Cook County, Ill.*, 506 U.S. 56 (1992), and *Camara v. Mun. Court of San Francisco*, 387 U.S. 523 (1967).

In *Frank v. Maryland*, 359 U.S. 360 (1959) (5-4 decision), *overruled by Camara*, 387 U.S. at 523 (1967), the Court upheld, by a five-to-four vote, a state court conviction of a homeowner who refused to permit a municipal health inspector to enter and inspect his premises without a search warrant. In his majority opinion, Justice Frankfurter suggested that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior, and that a warrant is not required for an administrative inspection because the "power [to inspect dwellings to maintain community health] would be greatly hobbled by the blanket requirement of the safeguards necessary for a search of evidence of criminal acts." *Id.* at 372.

In *Camara*, 387 U.S. at 534, the Court expressly overruled *Frank v. Maryland*, holding that under the Fourth Amendment a lessee of the ground floor of an apartment building had a constitutional right to insist that San Francisco Department of Public Health Housing Code inspectors obtain a judicial warrant to inspect his premises, and that he could not be constitutionally convicted for refusal to consent to the inspection. The Dallas URSB advances the same "public necessity" arguments in support of warrantless, non-exigent seizures and destruction of private property that the Court firmly rejected as insufficient to uphold San Francisco's warrantless, non-exigent housing code inspections in *Camara*. San Francisco argued that (i) the ordinances authorizing inspections are hedged with safeguards and the inspector's decision to enter must

comply with the standard of reasonableness even if he may enter without a warrant, *id.* at 531; (ii) the warrant process could not function effectively in this field, *id.* at 532; and (iii) the public interest demands warrantless administrative searches as the only effective means of enforcing minimum fire, housing, and sanitation standards, *id.* at 533. As Justice White, writing for the *Camara* majority, explained:

> In our opinion, these arguments unduly discount the purposes behind the warrant machinery contemplated by the Fourth Amendment. Under the present system, when the inspector demands entry, the occupant has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization. These are questions which may be reviewed by a neutral magistrate without any reassessment of the basic agency decision to canvass an area. . . . We simply cannot say that the protections provided by the warrant procedure are not needed in this context; broad statutory safeguards are no substitute for individualized review, particularly when those safeguards may only be invoked at the risk of a criminal penalty.
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> . . . It has nowhere been urged that fire, health, and housing code inspection programs could not achieve their goals within the confines of a reasonable warrant requirement. Thus, we do not find the public need argument dispositive.

In summary, we hold that administrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual, and that the reasons put forth in *Frank v. State of Maryland* and in other cases for upholding these warrantless searches are insufficient to justify so substantial a weakening of the Fourth Amendment's protections. *Id.* at 532-34.

Thus, *Camara* held that, in the absence of consent or an emergency situation, the Fourth Amendment requires that a warrant be issued by a judicial officer before a government entity may inspect private property to enforce minimum health and safety standards for the prevention of "fires and epidemics" or "unsightly conditions adversely affect[ing] the economic values of neighboring structures." *Id.* at 534, 535, & 539-40.

In the second part of its opinion, the Court in *Camara* discussed the type of "probable cause" required for a warrant to enter and inspect private property. The Court concluded that " 'a health official need [not] show the same kind of proof to a magistrate as one must who would search for the fruits or instrumentalities of crime.' " *Id.* at 538 (quoting *Frank*, 359 U.S. at 383) (Douglas, J., dissenting)). Instead, the satisfaction of reasonable legislative or administrative standards for inspections may be used to show "probable cause," such as the passage of time, the nature of the buildings, the condition of the entire area, or other factors not necessarily dependent upon specific knowledge of the condition of a particular dwelling. *See id.* "[R]easonableness is

still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted warrant." *Id.* at 539.[1]

In *Soldal*, 506 U.S. at 61, the Court held that the presence of deputy sheriffs for the purpose of forestalling the Soldal family's resistance while a trailer park operator seized and removed the family's house trailer from the park, without a warrant, eviction judgment, other judicial order, or exigent circumstances, clearly implicated the Soldals' Fourth Amendment rights. In an unanimous opinion by Justice White, the Court rejected the Seventh Circuit's narrow reading of the Amendment, which the Circuit construed as safeguarding only privacy and liberty interests while leaving unprotected possessory interests when neither privacy nor liberty is at stake. *Id.* at 62. The Court held that "[t]he Amendment protects the people from unreasonable searches and seizures of 'their persons, houses, papers, and effects.' This language surely cuts against the novel holding below, and our cases unmistakably hold that the Amendment protects property as well as privacy." *Id.* The Court pointed to its decisions explaining that a "seizure" of property occurs when " 'there is some meaningful interference with an individual's possessory interests in that property,' " *id.* at

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[1] In *See v. City of Seattle*, 387 U.S. 541 (1967), decided the same day as *Camara*, the Court held that the Fourth Amendment forbids warrantless inspections of commercial structures as well as private residences. "[T]he basic component of a reasonable search under the Fourth Amendment – that it not be enforced without a suitable warrant procedure – is applicable in this context, as in others, to business as well as to residential premises." *Id.* at 546.

61 (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)), and concluded: "We fail to see how being unceremoniously dispossessed of one's home in the manner alleged to have occurred here can be viewed as anything but a seizure invoking the protection of the Fourth Amendment." *Id.*

The Court in *Soldal* stopped short of deciding whether the seizure was a violation of the Fourth Amendment because the Seventh Circuit had failed to reach that issue due to its incorrect decision that there had been no "seizure." A careful reading of the Court's unanimous *Soldal* opinion, however, strongly suggests that a violation had occurred under Fourth Amendment law because (1) the dispossession of the Soldals of their trailer home was a "seizure" because it was a "meaningful interference" with their possessory interest, *id.* at 61, not an insignificant interference associated with a "garden-variety" landlord-tenant or commercial dispute, *id.* at 72; (2) the deputies were acting under color of state law in assisting in the seizure, *id.* at 60 n.6 & 71; (3) the officers were not acting pursuant to a warrant or other judicial order, *id.* at 58 and 71; (4) there was no probable cause to associate the seized property with criminal activity, *id.* at 68; and (5) there was no emergency situation because the seizure could have "properly awaited the state court's judgment," *id.* at 71.

The Court noted that the Seventh Circuit had correctly acknowledged that, under the Supreme Court's precedents, the Fourth Amendment's protection applies in the civil as well as the criminal context. *Id.* at 67. But the Supreme Court concluded that the Circuit had erred when it seemingly construed the Amendment to protect

only against seizures that are the outcome of a search. *Id.* at 68. "[O]ur cases are to the contrary and hold that seizures of property are subject to Fourth Amendment scrutiny even though no search within the meaning of the Amendment has taken place." Id. The Supreme Court explained that the Seventh Circuit's construction of the Fourth Amendment to protect only against seizures that are the outcome of a search is at odds with the Supreme Court's plain- view cases in which seizures of property are subject to Fourth Amendment scrutiny even though no search within the meaning of the Amendment has taken place. *Id.* at 68 (citing *United States v. Jacobsen*, 466 U.S. at 120-25; *United States v. Place*, 462 U.S. 696, 706-07 (1983); *Cardwell v. Lewis*, 417 U.S. 583, 588-89 (1974)). "For the plain-view cases clearly state that, notwithstanding the absence of any interference with privacy, seizures of effects that are not authorized by warrant are reasonable only because there is probable cause to associate the property with criminal activity." *Id.* at 69.

Significantly, the Court also made it clear that the Fourth Amendment protections are triggered when a government entity seizes a building to enforce compliance with housing regulations, stating:

> In our view, the reason why an officer might enter a house or effectuate a seizure is wholly irrelevant to the threshold question whether the Amendment applies. What matters is the intrusion on the people's security from governmental interference. Therefore, the right against unreasonable seizures would be no less transgressed if the seizure of the house was undertaken to collect evidence, verify compliance with a housing regulation, effect an eviction by the police,

> or on a whim, for no reason at all. As we have observed on more than one occasion, it would be "anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior."

*Id.* at 69 (quoting *Camara*, 387 U.S. at 530).[2]

Finally, the Court in *Soldal* characterized as "exaggerated" the fears of the Seventh Circuit and Cook County that applying the Fourth Amendment in this context will federalize areas of law traditionally the concern of the states, such as routine repossessions, negligent actions of public employees that interfere with individuals' right to enjoy their homes, and the like. *Id.* at 71. The Court's opinion expressly or impliedly indicates several reasons for this conclusion: (1) activities by state actors such as repossessions or attachments that involve entry into the home, intrusion on individuals' privacy, or interference with their liberty, have long been recognized as implicating Fourth Amendment rights; (2) if the state action does not involve privacy or liberty interests," 'reasonableness is still the ultimate standard[. If a valid public interest

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[2] *See also United States v. Jacobsen*, 466 U.S. at 125 n.28 (relied on prominently in *Soldal*, in which the Court issued the following caveat: "Of course, where more substantial invasions [than taking a trace of powder for a chemical test] of constitutionally protected interests are involved, a warrantless search or seizure is unreasonable in the absence of exigent circumstances." (citing *Steagald v. United States*, 451 U.S. 204 (1981); *Payton v. New York*, 445 U.S. 573 (1980); *Dunaway v. New York*, 442 U.S. 200 (1979); *United States v. Chadwick*, 433 U.S. 1 (1977))).

justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant.]' " *Id.* (quoting *Camara*, 387 U.S. at 539) (bracketed material added. *See Camara*, 387 U.S. at 539). Thus, generally speaking, a state officer will not violate the Fourth Amendment when his acts under color of law are (a) pursuant to a warrant or other judicial or court order, *see id.*; (b) in emergency situations, *see Camara*, 387 U.S. at 539; or (c) insignificant interferences associated with "garden variety" commercial or landlord-tenant disputes, *Soldal*, 506 U.S. at 72, rather than "some meaningful interference with an individual's possessory interests in . . . property." *Id.* at 61 (quoting *Jacobsen*, 466 U.S. at 113). For these reasons, it is evident that, if the Court in *Soldal* had been required to reach the issue, it would have concluded that the seizure in which the Soldals were "unceremoniously dispossessed" of their trailer home, without a warrant, eviction judgment, or other judicial order, and in the absence of any emergency, was a violation of the Soldals' Fourth Amendment rights.[3]

Correspondingly, the Dallas URSB's seizure and destruction of the private property owners' edifices were "meaningful interferences" with their possessory interests in their buildings, not a "garden-variety" commercial or landlord-tenant controversy. On the contrary, it was a

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[3] On remand, in light of the Supreme Court's decision, the district court concluded that the defendants were not entitled to qualified immunity. "Because we determine that plaintiffs' allegations support an inference that the defendants were aware of circumstances making their actions unreasonable, and hence, illegal, we refuse to dismiss the action." *Soldal v. County of Cook*, No. 88C7654, 1993 WL 199050, *5 n.1 (N.D. Ill. June 10, 1993).

seizure and destruction of private property that was at least as invasive as the removal of a house trailer from a trailer park or the seizure of a building "undertaken to collect evidence, verify compliance with a housing regulation, effect an eviction by the police, or on a whim, for no reason at all." *Soldal*, 506 U.S. at 69. Consequently, the administrative seizures and demolitions by the URSB at issue in the present case were significant intrusions upon the interests of private property owners protected by the Fourth Amendment, and such seizures and demolitions by the URSB, a government entity acting under color of state law, not pursuant to a judicial warrant or court order, and not in an emergency situation, are clear violations of the Fourth and Fourteenth Amendments. *See Camara*, 387 U.S. at 534; *Soldal*, 506 U.S. at 66-67.

### B. This Court Is Bound By *Camara* and *See*, Not *Frank v. Maryland*

A Federal Court of Appeals is bound by the decisions of the Supreme Court, even if the intermediate appellate judges think that a Supreme Court decision is unsound or in error. *See Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983); *Hutto v. Davis*, 454 U.S. 370, 375 (1982); *Jaffree v. Wallace*, 705 F.2d 1526, 1532-33 (11th Cir. 1983) (citing and quoting *Stell v. Savannah-Chatam County Bd. of Educ.*, 333 F.2d 55, 61 (5th Cir. 1964), *overruled in part on other grounds by United States v. Jefferson County Bd. of Educ.*, 380 F.2d 385 (1967)); *United States v. Twin City Power Co. of Georgia*, 253 F.2d 197, 205 (5th Cir. 1958); *Marcello v. Ahrens*, 212 F.2d 830, 839 (5th Cir. 1954), aff'd, 349 U.S. 302 (1955). Accordingly, this court must follow *Camara* and *See*, which held that, because of the

Fourth Amendment, administrative entry or invasion of private residential or commercial property, without consent or an emergency situation, may only be compelled within the framework of a suitable judicial warrant procedure.

Nevertheless, the majority concludes that the district court and the panel Fourth Amendment majority were wrong in holding that the URSB violated the building owners' Fourth Amendment rights by seizing and destroying their private property without consent or a warrant and in the absence of exigent circumstances. This conclusion is based on a common theme, (i) that the Fourth Amendment does not require a judicial warrant procedure to protect individuals from meaningful interferences with their possessory interests in private property by governmental entities; (ii) instead, the Amendment only protects such individuals by the deterrent effects of reparations under § 1983 if it is determined ex post facto that private property was seized or destroyed "unreasonably" according to a standard of reasonableness or a balancing of private and public interests. In effect, the majority seems to think that the warrant requirements of *Camara* and *See* have been overruled and *Frank v. Maryland*'s warrantless standard of reasonableness has been resurrected in their place.

Similarly, the majority's reasoning erroneously suggests that Justice White's references in part III of *Soldal* to *Camara* and *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), somehow signal approval of warrantless seizures of private property, without consent or exigent circumstances, by officers acting under color of law, so long as the

officers comply with a standard of reasonableness reflecting a careful balancing of public and private interests. The passage containing those references, part of Justice White's explanation that *Soldal*'s interpretation of the Fourth Amendment involves little or no risk of federalizing state law, states:

> More significantly, "reasonableness is still the ultimate standard" under the Fourth Amendment, *Camara, supra*, 387 U.S., at 539, 87 S.Ct., at 1736, which means that numerous seizures of this type will survive constitutional scrutiny. As is true in other circumstances, the reasonableness determination will reflect a "careful balancing of governmental and private interests." *T.L.O., supra*, 469 U.S., at 341, 105 S.Ct., at 742. Assuming, for example, that the officers were acting pursuant to a court order, as in *Specht v. Jensen*, 832 F.2d 1516 (CA10 1987), or *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972), and as often would be the case, a showing of unreasonableness on these facts would be a laborious task indeed. *Cf. Simms v. Slacum*, 3 Cranch 300, 301, 2 L.Ed. 446 (1806). Hence, while there is no guarantee against the filing of frivolous suits, had the ejection in this case properly awaited the state court's judgment it is quite unlikely that the federal court would have been bothered with a § 1983 action alleging a Fourth Amendment violation.

*Soldal*, 506 U.S. at 71.

A careful reading of the complete passages from which Justice White quoted in the forgoing paragraph shows that he, as the author of *Camara*, *T.L.O.*, and *Soldal*, did not in any of those passages suggest dispensing with

the warrant procedure. To the contrary, he consistently repeated the idea he expressed for the Court in *Camara*, "that a health official need not show the same kind of proof to a magistrate to obtain a warrant as one must who would search for the fruits or instrumentalities of crime." *Camara*, 387 U.S. at 538. Later in *Camara*, in the passage partially quoted in *Soldal*, Justice White stated: "The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest. But reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant." *Id.* at 539. The same day in *See*, he expressed these ideas in a different way:

> The agency's particular demand for access will of course be measured, in terms of probable cause to issue a warrant, against a flexible standard of reasonableness that takes into account the public need for effective enforcement of the particular regulation involved. But the decision to enter and inspect will not be the product of the unreviewed discretion of the enforcement officer in the field.

*See*, 387 U.S. at 545 (footnote omitted). His full sentence describing the flexible probable cause concept in *T.L.O.*, reads: "Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard." *T.L.O.*, 469 U.S. at 341.

Justice White also wrote for the Supreme Court in *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 325 (1978), which held that, under the warrant clause of the Fourth Amendment, the Occupational Safety and Health Act (OSHA) is unconstitutional to the extent that it would permit inspections of private businesses by OSHA inspectors without a warrant or its equivalent. He began by reaffirming that "[t]he Warrant Clause of the Fourth Amendment protects commercial buildings as well as private homes", *id.* at 311, and that, accordingly, "warrantless searches are generally unreasonable, and that this rule applies to commercial premises as well as homes." *Id.* at 312. Justice White then discussed *Camara* and *See*, and then concluded "that unless some recognized exception to the warrant requirement applies, *See v. City of Seattle* would require a warrant to conduct the inspection sought in this case." *Id.* at 313. Because of the absence of a recognized exception to the warrant requirement – such as pervasively regulated businesses in which entrepreneurs voluntarily choose to subject themselves to the full arsenal of governmental regulation thereby precluding a reasonable expectation of privacy (which is clearly the exception and not the rule) – without a warrant a government inspector "stands in no better position than a member of the public." *Id.* at 313-15.

Most important, in *Marshall*, Justice White expressly rejected the Secretary of Labor's argument that "the enforcement scheme of the Act requires warrantless searches, and that the restrictions on search discretion contained in the Act and in its regulations already protect as much privacy as a warrant would." *Id.* at 315. These are precisely the arguments advanced by the City of

Dallas and accepted by the majority in this case. In fact, as the following passage aptly demonstrates, these arguments take out of context *Soldal*'s quotation from *Camara* ("reasonableness is still the ultimate standard") and attribute to it a meaning explicitly rejected by Justice White:

> The Secretary thereby asserts the actual reasonableness of OSHA searches, whatever the general rule against warrantless searches might be. Because "reasonableness is still the ultimate standard," *Camara v. Municipal Court*, 387 U.S., at 539, 87 S.Ct., at 1736, the Secretary suggests that the Court decide whether a warrant is needed by arriving at a sensible balance between the administrative necessities of OSHA inspections and the incremental protection of privacy of business owners a warrant would afford. He suggests that only a decision exempting OSHA inspections from the warrant clause would give "full recognition to the competing public and private interests here at stake." *Ibid.*
>
> . . . .
>
> We are unconvinced, however, that requiring warrants to inspect will impose serious burdens on the inspection system or the courts, will prevent inspections necessary to enforce the statute, or will make them less effective.
>
> . . .

*Id.* at 315-16.

Moreover, Justice White makes crystal clear that "reasonableness" afforded by the statutory scheme may substitute for probable cause to issue the warrant, but it may not substitute for the warrant itself:

> Whether the Secretary proceeds to secure a warrant or other process, with or without prior notice, his entitlement to inspect will not depend on his demonstrating probable cause to believe that conditions in violation of OSHA exist on the premises. Probable cause in the criminal law sense is not required. For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]." *Camara v. Municipal Court*, 387 U.S., at 538, 87 S.Ct., at 1736. . . . We doubt that the consumption of enforcement energies in the obtaining of such warrants will exceed manageable proportions.

*Id.* at 320-21 (footnote omitted) (bracketed text in original).

Finally, Justice White rejected the notion "that the incremental protections afforded the employer's privacy by a warrant are so marginal that they fail to justify the administrative burdens that may be entailed." *Id.* at 322.

> The authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search. A warrant, by contrast, would provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is

> pursuant to an administrative plan containing specific neutral criteria.

*Id.* at 323 (footnote omitted).

Against this background, it is clear that Justice White in the *Soldal* paragraph quoting parts of the *Camara* and *T.L.O.* passages did not impliedly or silently overrule the principal holding of *Camara* that significant administrative intrusions require a warrant procedure, in the absence of consent or an emergency.[4] Read within the context of the passages from *Camara, See, Marshall,* and *T.L.O.*, describing the flexible standard of reasonableness, it is clear that in that *Soldal* paragraph Justice White merely expressed the opinion that it will be difficult to show a Fourth Amendment violation when an officer seizes property pursuant to a court order, if the order was measured and issued according to a reasonable standard based on a careful balancing of public and private interests. This meaning is borne out by the citation in the *Soldal* paragraph calling upon the reader to reference *Simms v. Slacum*, 3 Cranch 300, 301, 7 U.S. 300, 306-07 (1806), in which Chief Justice Marshall stated:

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[4] In summary, we hold that administrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual, and that the reasons put forth in *Frank v. Maryland* and in other cases for upholding these warrantless searches are insufficient to justify so substantial a weakening of the Fourth Amendment protections.

*Camara*, 387 U.S. at 534.

> The judgments of a court of competent jurisdiction, although obtained by fraud, have never been considered as absolutely void; and, therefore, all acts performed under them are valid so far as respects third persons. A sheriff who levies an execution under a judgment fraudulently obtained, is not a trespasser, nor can the person who purchases at a sale under such an execution, be compelled to relinquish the property he has purchased.

7 U.S. at 306-07.

In short, *Camara, See, Marshall, T.L.O.*, and *Soldal* all indicate that under certain circumstances a flexible standard of reasonableness can substitute for the kind of probable cause that must be shown by law enforcement officers to obtain a warrant to search for criminal evidence; they do not support the notion that reasonableness can substitute for the judicial warrant that is required before an administrative search or seizure of private property without consent or an emergency situation.

This court cannot legitimately overrule or disregard *Camara* and *See*, which require a warrant before a municipality can effect a search or seizure of private residential or commercial property without consent or emergency circumstances under health, safety, and building regulations, even if a flexible probable cause or reasonableness standard has been met.

The language upon which the majority relies in arguing that *Camara* and *See* are inapplicable is taken out of context from the "special, beyond normal, law enforcement needs" cases that are inapposite here. The cases the majority cites – *Vernonia Sch. Dist. v. Acton* (suspicionless

random drug testing of high school athletes in a particular exigent factual situation); *Griffin v. Wisconsin* (reasonable grounds search without a warrant of probationer within legal custody under state law pursuant to a state regulation authorizing such warrantless searches); *New Jersey v. T.L.O.* (search of student's purse on suspicion of violation of school rule against smoking) – are those in which the Court has "permitted exceptions when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.' " *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 653 (1995) (citing *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)).

The Court in those cases clearly limited the "special needs" exception to the warrant requirement to special situations in criminal law enforcement: "A State's operation of a probation system, like its operation of a school, government office or prison, or its supervision of a regulated industry, likewise presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable cause requirements." *Griffin*, 483 U.S. at 873-74; *see also Chandler v. Miller*, 520 U.S. 305 (1997) (Georgia's requirement that candidates for state office pass drug test did not fit within closely guarded special needs category of constitutionally permissible suspicionless searches ); *United Teachers of New Orleans v. Orleans Parish Sch. Bd.*, 142 F.3d 853 (5th Cir. 1998) (school board's rules violated Fourth Amendment inasmuch as no special needs exception to requirement of individualized suspicion of wrongdoing applied).

The present case is not a criminal law enforcement case, much less a "special needs, beyond the normal need

for law enforcement" case, and it is certainly not a case in which the warrant requirement is impracticable. The majority's rejection of the warrant requirement in this case makes it difficult to say that it exists at all in the Fifth Circuit, except for few persons whose criminal convictions are reversed because the violation of their Fourth Amendment rights was so flagrant as to amount to harmful, reversible error.

### C. This Circuit and Others

In concluding that the URSB violated the owners' Fourth Amendment rights, the *Freeman* panel Fourth Amendment majority decision followed the controlling precedent of this Circuit, and this decision does not conflict with what is the controlling precedents of other circuits.

In *United States v. Paige*, 136 F.3d 1012, 1021 (5th Cir. 1998), this court recognized that "[t]he Supreme Court recently made clear that the protection afforded by the Fourth Amendment extends to an individual's possessory interests in property, even if his expectation of privacy in that property has been completely extinguished." (citing *Soldal*, 506 U.S. at 62-63). This court in *Paige* also observed that "[g]enerally, 'seizures conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment-subject only to a few specifically established and well delineated exceptions.' " *Id.* at 1022 (quoting *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993)). The *Freeman* Fourth Amendment majority applied Paige's teachings from the Supreme Court cases of *United States v. Jacobsen*, 466 U.S.

109, and *United States v. Place*, 462 U.S. 696, to conclude that the URSB seizures do not fall within an exception to the warrant requirement fashioned in those cases because the seizures were not lawful and temporary in their inception, the seizures did not have a de minimis impact on the owners' property interests, and it could not be said that the safeguards of a warrant would have only minimally advanced Fourth Amendment interests. *Freeman v. City of Dallas*, 186 F.3d 601, 606 (5th Cir. 1999).

The *Freeman* Fourth Amendment majority is not inconsistent with the other Circuits' leading cases although it is at odds with an Eighth Circuit case. In *Flatford v. City of Monroe*, 17 F.3d 162, 170 (6th Cir. 1994), the Sixth Circuit held that under the Fourth Amendment the plaintiffs "were entitled to pre-eviction judicial oversight in the absence of emergency circumstances." That court also found that the eviction had been predicated upon exigent circumstances. *Id.* at 170-71. In *Hroch v. City of Omaha*, 4 F.3d 693, 697 (8th Cir. 1993), the Eighth Circuit held that the defendants' actions in implementing the City's condemnation order did not constitute an unreasonable seizure in violation of Hroch's Fourth Amendment rights. The *Hroch* court pointed out that a state court had denied an injunction so that there was judicial oversight of the condemnation process which provided "a constitutionally adequate substitute for a warrant." *Id.* at 696-97 (citing and quoting *Donovan v. Dewey*, 452 U.S. 594, 603 (1981)). In *Conner v. City of Santa Ana*, 897 F.2d 1487, 1492 (9th Cir. 1990), the Ninth Circuit held that a search and seizure of the Conners' property to abate a known

nuisance without any judicial authorization was impermissible under the Fourth Amendment. Although *Conner* was decided before *Soldal*, it is consistent with that decision because it relied on *Camara*, and *Soldal* did not change *Camara*; rather, *Soldal* only reaffirmed what had been established before, that the Fourth Amendment protects property as well as privacy and may protect property interests even when neither privacy nor liberty is at stake. *Soldal*, 506 U.S. at 62-71. In *Samuels v. Meriwether*, 94 F.3d 1163, 1167-68 (8th Cir. 1996), however, the Eighth Circuit misread *Soldal* as overruling *Camara* sub silentio and replacing the warrant process required by *Camara* with a reasonableness balancing test. *Soldal* does not express or imply such an intention, however, and it is absurd to attribute to Justice White, the author of both opinions, an intention to overrule *Camara* without saying so, particularly since he cites and quotes *Camara* prominently with approval in *Soldal*.

All of these circuit decisions, except *Samuels v. Meriwether*, are consistent with a correct reading of *Camara*, *See*, and *Soldal* which plainly indicate that, in the context of administrative searches and seizures, compliance with reasonable legislative and administrative standards may serve as probable cause for a warrant, but not as a substitute for the warrant procedure itself; *see Camara*, 387 U.S. at 538, 545-46; *Soldal*, 506 U.S. at 71; although nothing forecloses prompt inspections, even without a warrant, that the law has traditionally upheld in emergency situations. *See Camara*, 387 U.S. at 539.

**D. Other Arguments**

A number of rationales are advanced by the majority that have a false appearance of genuineness, but are really only variations on their main theme of contention:

(1) That only self-imposed reasonableness is required of a governmental entity in seizing and razing buildings for urban renewal, and the municipal procedures followed by the URSB assured sufficient reasonableness in this case. This argument is premised upon two faulty propositions: (i) that Fourteenth Amendment due process of law and Fourth Amendment reasonableness analyses are fungible; and (ii) that *Soldal* sub silentio overruled *Camara* and its warrant requirement for administrative searches and seizures, thereby resurrecting *Frank v. Maryland* and its warrantless reasonableness standard. With respect to (i), in *Soldal*, the Supreme Court expressly rejected that proposition, stating that "[c]ertain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands. Where such multiple violations are alleged . . . we examine each constitutional provision in turn." 506 U.S. at 70; *see also United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 49-50 (1993) (in considering claims that the same government conduct violated both the Fourth Amendment protections against unreasonable seizure and the Fifth Amendment protections of due process of law, the Court stated that it has repeatedly rejected the view that the applicability of one constitutional amendment preempts the guarantees of another). *Flatford*, 17 F.3d at 170-71, does not support the argument either, because it, in effect, merely concludes that both the Fourth Amendment and Due Process standards are relaxed where the

conduct complained of is justified by exigent circumstances. With respect to (ii), as demonstrated earlier, *Soldal*, a unanimous opinion by Justice White, building on and citing with approval his own opinion for the court in *Camara*, cannot reasonably be read to implicitly or silently overrule *Camara*'s core holding that, in the absence of consent or exigent circumstances, administrative searches or seizures of private houses or buildings without a judicial warrant violate the Fourth Amendment, and that *Frank v. Maryland* is expressly overruled.

(2) That the URSB is the functional equivalent of a neutral and detached judicial officer. The fallacy of this contention is self-evident. The URSB is an agency of the City of Dallas charged with the remediation – including the demolition – of structures deemed by it to constitute urban nuisances. The URSB's job is to eliminate unsightly conditions adversely affecting the economic value of neighboring property and the City's tax base. The URSB cannot possibly serve effectively in this executive capacity and act as a neutral and detached magistrate to safeguard the rights of the owners whose buildings it determines should be razed. "When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." *Camara*, 387 U.S. at 529 (citing and quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)). This principle applies with equal force to the seizure and destruction of real property by government enforcement agencies such as the URSB, because the decision to seize and destroy private property under these circumstances, like the decision to enter and inspect, "[can]not be the product of unreviewed discretion of the

enforcement officer in the field." *Id.* at 545. Rather, the "warrant machinery contemplated by the Fourth Amendment" so prominently emphasized by Justice White is necessarily administered by a "neutral magistrate." *See Camara*, 387 U.S. at 532; *Marshall*, 436 U.S. at 323.

(3) That the warrant process would overburden the URSB. This argument was rejected firmly by the Supreme Court in *Camara*, *see* 387 U.S. at 532, and again in *Marshall*, 436 U.S. at 321. Moreover, the step of securing a warrant issued by a neutral and detached judicial officer is not difficult or time consuming. The property owner benefits greatly from the safeguarding of his protected interests that can only be provided by a neutral judicial officer's pre-execution approval of the seizure and demolition. In the present case, as is typical, almost a year passed between the notices of noncompliance and the ultimate demolition orders. Had the URSB at the appropriate time during this lengthy period properly obtained a warrant for the seizure and demolition of the owners' buildings, it is almost certain that the federal court would not have been bothered with this § 1983 action alleging a Fourth Amendment violation.

(4) That Texas currently has no procedural mechanism for judicial oversight of public nuisance abatement. However, it appears that such oversight is provided for by Texas legislated law. *See* Tex. Gov't. Code Ann. § § 24.08 (district court may hear and determine any cause cognizable by courts of law or equity), and 24.011 (district court judge may grant all writs necessary to enforce the court's jurisdiction). Moreover, judicial oversight of public nuisance abatement in the context of this case is required by Texas jurisprudence. *See City of*

*Houston v. Lurie*, 224 S.W.2d 871, 874 (Tex. 1949) ("It has been repeatedly held that the question whether property is a public nuisance and may be condemned as such is a justiciable question to be determined by a court."); *Hart v. City of Dallas*, 565 S.W.2d 373, 379 (Tex.Civ.App.-Tyler 1978, no writ) (whether the URSB or the city council made the determination that the house was a hazard to the health, safety, and welfare of the citizens, "the City would have been without authority to demolish the house in the absence of a judicial determination that the house was a nuisance in fact."). Moreover, even if the Texas courts lacked express statutory or jurisprudential authority to issue warrants for the search or seizure of property, undoubtedly they are endowed with such authority by the Fourth Amendment, the State Constitution, and their inherent judicial powers.

## II. DUE PROCESS

The plaintiffs cross-appealed the district court's ruling against their Fifth Amendment claim. I dissent from the en banc majority's decision, affirming summary judgment in favor of the City of Dallas on the due process claim for the same reasons that I dissented from the panel's decision. *See Freeman*, 186 F.3d at 612-14 (Dennis, dissenting).

A governmental seizure of a person's property implicates two explicit textual sources of constitutional protection, the Fourth and Fifth Amendments. *James Daniel Good Real Prop.*, 510 U.S. at 49-50; *Soldal v. Cook County*, 506 U.S. at 61, 70-71. Although the decision in *James Daniel Good Real Property* was based upon the procedural protections

of the Fifth Amendment's Due Process Clause, the similarly worded procedural protections of the Fourteenth Amendment's Due Process Clause apply with equal force to states and municipalities.[5]

The City does not, and could not, dispute that the seizure and destruction of the plaintiffs' real property

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[5] The Supreme Court has held that the Fourteenth Amendment's Due Process Clause "legitimately operates to extend to the citizens and residents of the States the same protection against arbitrary state legislation, affecting life, liberty and property, as is offered by the Fifth Amendment against similar legislation by Congress." *Hibben v. Smith*, 191 U.S. 310, 325 (1903). Of the guarantees of the Fifth Amendment, only the grand jury clause has been held not to be applicable to the states. 2 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 14.2, at 347-48 (2d ed. 1992) (citing *Hurtado v. California*, 110 U.S. 516 (1884)). The Fifth Amendment prohibitions of compulsory self-incrimination and double jeopardy were made applicable to the states in *Malloy v. Hogan*, 378 U.S. 1 (1964), and *Benton v. Maryland*, 395 U.S. 784 (1969), respectively. In addition, although the Fifth Amendment's just compensation provision has not "technically" been incorporated against the states, "the Court has held that the fourteenth amendment due process guarantee provides the same safeguard against a state's taking of property without just compensation." 2 Rotunda & Nowak, *supra*, § 14.2, at 350 (citing *Chicago B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897)). *See also Hurtado v. California*, 110 U.S. 516, 541 (1884) (Harlan, J., dissenting) ("[T]he 5th [amendment] provided that 'no person shall be deprived of life, liberty or property, without due process of law.' This language is similar to that of the clause of the 14th amendment now under examination. That similarity was not accidental, but evinces a purpose to impose upon the States the same restrictions, in respect of proceedings involving life, liberty and property, which had been imposed upon the General Government.").

deprived them of property interests protected by the Fifth and Fourteenth Amendments' Due Process Clauses. The City argues, however, that a hearing before a panel of the City's own Urban Rehabilitation Standards Board afforded the plaintiffs all the process they were due before their property was seized and destroyed. I believe that in the absence of an extraordinary situation, which did not exist in the present case, the Due Process Clauses require that, before a person is deprived of his real property by the government, he must be given notice and an opportunity for a meaningful hearing before a neutral magistrate, and that there must be a judicial determination that the seizure is justified.

Where the government seizes property not to preserve evidence of criminal wrongdoing but to assert ownership and control over the property, its action must also comply with the procedural protections of the Due Process Clauses of the Fifth and Fourteenth Amendments. *James Daniel Good Real Prop.*, 510 U.S. at 50. The Supreme Court's precedents establish the general rule that Due Process requires that, absent an extraordinary situation, a party cannot invoke the power of the state to seize a person's property without a prior judicial determination that the seizure is justified. *United States v. $8,850*, 461 U.S. 555, 562 n.12 (1983) (citing *Boddie v. Connecticut*, 401 U.S. 371, 378-379 (1971)); *see also North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1974); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974). Due Process also requires that individuals must receive notice and an opportunity to be heard before the government deprives them of property. *James Daniel Good*

*Real Prop.*, 510 U.S. at 48 (citing *$8,850*, 461 U.S. at 562 n. 12; *Fuentes*, 407 U.S. at 82; *Sniadach*, 395 U.S. at 342 (Harlan, J., concurring); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)).

In *James Daniel Good Real Property*, the Supreme Court held that, in the absence of exigent circumstances, the Due Process Clause requires the government to afford notice and a meaningful opportunity to be heard in an adversary hearing, to ensure the requisite neutrality that must inform governmental decisionmaking, before seizing real property subject to civil forfeiture. 510 U.S. at 48, 53-56. The protection of an adversary hearing before a neutral magistrate is of particular importance where the government has a direct pecuniary interest in the outcome of the proceeding. *Id.* at 55-56. In *James Daniel Good Real Property*, the Supreme Court emphasized that "[t]he constitutional limitations we enforce in this case apply to real property in general, not simply to residences." *Id.* at 61.

Accordingly, the Due Process requirements of notice, a meaningful adversary hearing before a neutral magistrate, and a judicial determination of justification must be afforded to a person before his real property is seized and destroyed in order to abate or rehabilitate an "urban nuisance." In a case such as the present one, there is need for equally rigorous adherence to the principles of Due Process as in civil forfeitures of real property. The City of Dallas has pecuniary interests in the outcome of such proceedings, e.g., justification for federal and state urban renewal grants; enhancement of the municipal tax base by promoting the replacement of old buildings with new

ones. The need for safeguards against arbitrary, capricious, or unreasonable seizures based on subjective standards may be even greater in "urban nuisance" or "urban rehabilitation" cases. Moreover, a post-seizure hearing cannot provide any remedy in such cases because the destroyed property cannot be restored and the best evidence of whether the seizure was justified will have been demolished also. It is not necessary to accomplish the City's legitimate goals of urban rehabilitation that an owner whose real property the City proposes to destroy be deprived of an opportunity for a meaningful pre-seizure adversary hearing before a neutral and impartial judge or magistrate. Requiring the City to postpone seizure and destruction until after such a hearing and judicial determination that the seizure is justified creates no significant administrative burden. And any harm that results from delay is minimal in comparison to the injury occasioned by the erroneous seizure and destruction of real property. *Id.* at 59.

## III. CONCLUSION

In summary, *Camara* and *See* require a judicial warrant procedure for the administrative search or seizure of private property, except in consensual or emergency situations. *Soldal* does not overrule or modify *Camara* or *See*; it simply makes clear that the Fourth Amendment protects property as well as privacy and liberty. The *Freeman* Fourth Amendment majority correctly applied *Camara*, *See*, and *Soldal*, and the other circuits' decisions, except for one, are not in conflict with that interpretation. Thus, I would affirm the judgment against the City of Dallas.

Because the process used by the City of Dallas failed to meet the requirements of due process as dictated by the Fifth Amendment, I would also reverse the judgment for the City of Dallas and would grant summary judgment in favor of the plaintiffs on this claim.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-10907

Charles Freeman and Rosalyn Brown,

Plaintiffs-Appellees-Cross-Appellants,

VERSUS

City of Dallas,

Defendant-Appellant-Cross-Appellee.

Appeals from the United States District Court
for the Northern District of Texas

August 18, 1999

Before EMILIO M. GARZA, BENAVIDES, and DENNIS, Circuit Judges.

DENNIS, Circuit Judge:

This case presents the questions of whether the seizure and destruction of the Plaintiffs' vacant apartment buildings by the City of Dallas, as "urban nuisances," based only on the findings and order of a panel of the City's Urban Rehabilitation Standards Board: (1) violated the Due Process Clauses of the Fifth and Fourteenth Amendments because the owners were not given an opportunity for an adversary hearing before a neutral magistrate and a judicial determination prior to the seizure and destruction of their real property; and (2) violated the Fourth Amendment, because the City seized and destroyed the Plaintiffs' property without a warrant issued by a magistrate based on a finding of probable cause.

A majority of this panel holds that the notice and hearings provided by the City satisfied the constitutional Fifth and Fourteenth Amendment's guarantees against deprivation of property without due process of law. A different majority of this panel holds that the Fourth and Fourteenth Amendments were violated when the City seized and destroyed the Plaintiffs' property without a warrant issued by a judicial officer based on probable cause. The district court's judgment reaching the same results is affirmed.

## I. FACTS AND PROCEDURAL HISTORY

Charles Freeman and Rosalyn Brown owned two apartment buildings in Dallas, Texas. Ms. Brown bought the building located at 2621 Meyers Street on December 26, 1992, and filed a warranty deed in the Dallas County Deed Records on July 1, 1993. Ms. Brown bought the building located at 2611 Meyers Street on April 11, 1993, and filed a warranty deed on August 3, 1994. Warranty deeds were filed on August 11, 1994, in which Ms. Brown transferred a one percent undivided interest in both buildings to her brother, Charles Freeman. The buildings were vacant when Ms. Brown bought them and remained unoccupied until they were demolished.

The City of Dallas established the Urban Rehabilitation Standards Board (URSB) to determine whether property condition reports by city inspectors constitute violations of the City's building code. The URSB is composed of 30 members (and 8 alternates) who are appointed by the Dallas City Council. The URSB may determine, after a hearing, whether a given structure is an "urban

nuisance" and take various remedial measures. The URSB is authorized by city ordinance to order repairs, receivership, the closing and vacating of buildings, demolition, and civil penalties up to $2,000 a day against property owners who fail to repair or demolish a structure after a valid determination and order has been issued by the URSB. Dallas City Code, ch. 27, art. II, § 27-8.

In April and July of 1993, City code inspectors from the Department of Housing and Neighborhood Services reported to the URSB that the Plaintiffs' two apartment buildings were in violation of the City's building code. According to the inspectors the 2611 Meyers Street building was in need of repairs estimated to cost $84,290.00, and the 2621 Meyers Street building needed repairs costing $108,680.00.

The URSB scheduled hearings to determine whether the buildings were in violation of the city building code and whether remedial steps should be taken. The URSB functions through hearing panels composed of members of the URSB. The Dallas City Code establishes the procedure to be used by the panels. At a hearing "an owner, lessor, occupant, or leinholder may present witnesses in his own behalf and is entitled to cross-examine any witnesses appearing against him." Dallas, Tex., Code ch. 27, art. II, § 27-9(c). The decision of a hearing panel is final except that rehearings may be granted in certain instances. Also, the code authorizes an affected property owner to appeal from the panel decision to the state district court for a "limited hearing under the substantial evidence rule." *Id.* § 27-9(e).

Notice of the URSB panel hearings with respect to the Plaintiffs' two buildings were mailed to the persons listed as owners on the title records. With regard to the building at 2621 Meyers Street, the City sent notices to Rosalyn Brown and K.K. Stanfield (the previous owner) of the panel hearing "To Consider an Order of Repair or Correction of a Potential Urban Nuisance." Ms. Brown signed the return receipt on February 28, 1994. This notice listed all of the possible actions that the URSB could take, including demolition: "If the board orders demolition, closure, vacation or removal, and if it is done by city forces, you will be required to pay for the expenses or a lien will be placed against the property." This notice concluded by stating, "It is important that you attend this hearing or send a representative." With regard to the structure at 2611 Meyers Street, an identical notice was sent to the person listed as the owner on the title, Robert Burkhead. Ms. Brown had purchased the property but had not yet filed her warranty deed. It appears that neither Burkhead nor the Plaintiffs received advance notice of the hearing with respect to the 2611 Meyers Street building, but Mr. Freeman learned that it was also involved when he attended the hearing in response to the notice sent to Ms. Brown concerning the 2621 Meyers Street property.

At the hearing concerning the two apartment buildings on February 28, 1994, Mr. Freeman testified and was questioned by the panel members. The panel looked at pictures of the structures, questioned Mr. Freeman about what plans he had to repair them, and asked whether he had the money or the time to accomplish the tasks. Mr. Freeman testified that he intended to repair the buildings

himself and requested the panel to allow him sufficient time to do so. The panel members voiced their concerns about Mr. Freeman's ability to obtain the repair materials and his ability to renovate them by himself. The panel voted unanimously to demolish both structures.

Following this hearing, Freeman signed two notices of demolition for both apartment buildings. The City then sent out a "Notice of Demolition Order" for each building. As to the 2611 Meyers Street structure, the City sent notices to Freeman and Robert Burkhead. Freeman signed the return receipt on March 11, 1994, but Burkhead's notices were returned "Attempted – Not Known." Notices of a demolition order were sent to Rosalyn Brown and Charles Freeman as to the URSB's action concerning the 2621 Meyers Street building. Freeman signed return receipts of the notices on March 11, 1994. Each notice stated that the owners "may exercise your right to an administrative rehearing and review of this demolition order."

Mr. Freeman asked for and received a rehearing from the URSB on May 23, 1994. At the rehearing, the URSB members questioned Mr. Freeman about the two buildings, whether he had the materials to repair them, and whether any repairs had been made to the buildings since the last hearing. Mr. Freeman stated that had received some donated materials and he submitted pictures of one unit in the 2621 Meyers Street building that he had repaired. Several members of the URSB panel expressed disbelief that Mr. Freeman could renovate the units for $2000 each as he claimed. The URSB panel again voted to demolish both structures – the vote was unanimous as to

the 2611 Meyers Street building, and it was five to two as to the 2621 Meyers Street building.

On the day of the hearing, Mr. Freeman signed the "Notice of Demolition" of both the 2611 and 2621 Meyers Street buildings. Neither Freeman nor Brown appealed the URSB panel decision to the state district court. A notice entitled "Appeal Denied/Demolition" was sent to the owners of each building. Notice of the proposed demolition of 2611 Meyers Street was mailed to Freeman and Burkhead; notice of the proposed demolition for the other building was mailed to Freeman and Brown. Even though the notices for Freeman and Brown were sent to the same addresses at which they had received mail about earlier hearings, all of these were returned as "Unclaimed." No further notice was given to the Plaintiffs before the buildings were demolished in late December 1994. The costs of demolition by the City were assessed against Freeman and Brown in the amounts of $7954.72 for the building at 2611 Meyers Street and $7655.55 for the 2621 Meyers Street property.

On April 23, 1996, Freeman and Brown brought suit against the City of Dallas under 42 U.S.C. § 1983 in federal district court. Freeman and Brown contended that the City violated their rights under the Fourth, Fifth, and Fourteenth Amendments because the City did not provide adequate due process prior to demolishing the apartment buildings, did not obtain a warrant before seizing and destroying Plaintiffs' buildings, and did not provide any due process to the Plaintiffs prior to placing a lien against the property for the costs of demolition.

On cross motions for summary judgment, the trial judge partially granted Plaintiffs' motion, concluding that the City had violated the Fourth and Fourteenth Amendments by seizing and destroying Plaintiffs' buildings without a judicial warrant based on probable cause, and partially granted the City's motion by rejecting the Plaintiffs' Fifth and Fourteenth Amendments' due process claim. The case was submitted to a jury to determine damages under § 1983 for the City's warrantless seizure and destruction of the apartment buildings. The jury awarded $20,000 in damages to Freeman and Brown. The City appealed and the Plaintiffs cross-appealed following entry of this judgment.

## II. FOURTH AMENDMENT[1*]

The government's seizure of a person's property implicates the Fourth Amendment, which is "made applicable to the States by the Fourteenth[.]" *Soldal v. Cook County*, 506 U.S. 56, 61 (1992) (citing *Ker v. California*, 374 U.S. 23, 30 (1963)).

In this case, the City of Dallas seized and destroyed the buildings owned by the plaintiffs without a warrant. This act undoubtedly constituted a "seizure" because a seizure occurs when " 'there is some meaningful interference with an individual's possessory interests in that property.' " *Soldal*, 506 U.S. at 61 (quoting *United States v.*

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[1] *Judge Garza does not concur in this part of the opinion and dissents therefrom with reasons.

*Jacobsen*, 466 U.S. 109, 113 (1984)). The Fourth Amendment's protections extend not only to searches and seizures incident to criminal investigations but also to administrative searches and seizures in the civil context. *Id.* at 67.

The protection afforded by the Fourth Amendment extends to an individual's possessory interests in property, even if his expectation of privacy in that property has been completely extinguished and no search within the meaning of the Amendment has taken place. *Soldal*, 506 U.S. at 62-63, 68; *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *United States v. Paige*, 136 F.3d 1012, 1021 (5th Cir. 1998). Subject only to a few specifically established exceptions not applicable here, seizures conducted outside the judicial process, without prior approval by a judge or magistrate, based on probable cause, are per se unreasonable under the Fourth Amendment. *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993); *Paige*, 136 F.3d at 1021.

The seizures in this case do not fall within an exception to the warrant requirement fashioned by *United States v. Jacobsen*, 466 U.S. 109 (1984), and *United States v. Place*, 462 U.S. 696 (1983), allowing courts to decide after the fact whether a warrantless seizure was constitutionally unreasonable by balancing individual and government interests. Essentially, *Jacobsen* and *Place* hold that (1) a seizure lawful at its inception can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes possessory interests by, for example, converting a temporary deprivation of possessory interests into a permanent one; and that (2) to assess the reasonableness of the government conduct, a court must balance the nature and quality of the intrusion

on the individual's Fourth Amendment interests against the importance of the government interests alleged to justify the intrusion. In *Jacobsen*, the Supreme Court applied this test and concluded that the field test destruction/seizure of a trace amount of material which had already been lawfully detained, was reasonable because loss of the trace amount had only a de minimis impact on any protected property interest and that, under these circumstances, the safeguards of a warrant would only minimally advance Fourth Amendment interests. *Jacobsen*, 466 U.S. at 125. The Court in *Jacobsen* added a significant caveat: "Of course, where more substantial invasions of constitutionally protected interests are involved, a warrantless search or seizure is unreasonable in the absence of exigent circumstances." *Id.* at 125 n. 28 (citing authorities).

Thus, the *Jacobsen-Place* balancing test is not appropriate in this case. The seizure of the plaintiffs' real property was not lawful in its inception. Because their seized buildings were totally and permanently destroyed, it cannot be said that the seizure had only a de minimis impact on their protected property interests. The invasions of the plaintiffs' protected interests were more than "substantial." Under these circumstances, it cannot be said that the safeguards of a warrant would have only minimally advanced Fourth Amendment interests. Another panel of this court recently held that the holding in *Jacobsen* would not be extended to cases involving permanent seizures. *United State v. Paige*, 136 F.3d at 1022. Because there were no exigent circumstances, the warrantless seizure and destruction of plaintiffs' property

was unreasonable and a violation of the Fourth Amendment. *Jacobsen*, 466 U.S. at 125 n.28.

## III. DUE PROCESS[2**]

The district court granted the City of Dallas's motion for summary judgment on the issue of whether due process requirements were satisfied in the seizure and destruction of Plaintiff's property. This court reviews a grant of summary judgment de novo, applying the same standard as the district court. *Martin v. Memorial Hospital*, 130 F.3d 1143, 1147 (5th Cir. 1997). Summary judgment is appropriate if the evidence, viewed in the light most favorable to the non-movant, presents no genuine issue of material fact and if the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

The Fourteenth Amendment prohibits the government from depriving "any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. This guarantee affords procedural protections. *Daniels v. Williams*, 474 U.S. 327, 331-32 (1986). The government must give reasonable notice to an individual of its intention to deprive him of life, liberty, or property. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-15 (1950). It also must provide him with a meaningful opportunity to be heard. *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976); *Mullane*, 339 U.S. at 313-14. Following *Matthews*, we assess what process is due by considering and balancing three distinct factors:

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[2] **Judge Dennis does not agree with the majority as to this part of the opinion and dissents therefrom with reasons.

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Matthews*, 424 U.S. at 335. This approach reflects the fact that "due process is flexible and calls for such procedural protections as the particular situation demands."[3] *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *accord Faulder v. Texas Bd. of Pardons & Paroles*, 178 F.3d 343, 345 (5th Cir.) (per curiam) ("Procedural due process is an inherently flexible concept."), *cert. denied*, ___ U.S. ___, 119 S.Ct. 2362, ___ L.Ed.2d ___ (1999).

The Plaintiffs contend that they were denied a meaningful opportunity to be heard on the future of the apartment buildings because they were not told that the Department of Housing and Neighborhood Services had briefed panel members on their properties, they were not provided with the Department's information on their properties, they were not given notice of the tours of their

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[3] Applying the three-factor *Matthews* test, we usually hold that the individual must be heard prior to the deprivation. *See Zinermon v. Burch*, 494 U.S. 113, 127-28, 110 S.Ct. 975, 984, 108 L.Ed.2d 100, ___ (1990). However, when pre-deprivation procedural safeguards cannot be expected to protect against the type of deprivation involved, we find that a post-deprivation hearing satisfies due process. *See id.* at 128-30, 139, 110 S.Ct. at 984-85, 990, 108 L.Ed.2d at ___.

properties by URSB panel members, and the Department officials who reported the code violations were not present at either the hearings or the rehearings. We generally find a procedure to violate due process when the government fails to reveal its evidence. *See Greene v. McElroy*, 360 U.S. 474, 492-97 (1959). Non-disclosure by the government poses the risk of an erroneous deprivation because it forecloses the individual from testing the accuracy of the government's evidence. *See id.* at 496-97. This threat is so great that it generally outweighs considerations favoring non-disclosure. *Robbins v. United States R.R. Retirement Board*, 594 F.2d 448, 451-52 (5th Cir. 1979). *Cf. Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring) ("No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.").

We conclude that the URSB panel related to the Plaintiffs the evidence supporting the Department's recommendation to level the apartment buildings. During the rehearings, as well as the tour of 2621 Meyers Street preceding them, URSB panel members conveyed to Freeman their concerns over the condition of the apartment buildings. Other members alerted him to the repair cost estimates.[4] Freeman chose not to call the Department officials who had cited the apartment buildings for code

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[4] Before the rehearings, the URSB panel met with Department staffers to discuss Freeman's request to waive the rehearing fees. According to the transcript of this briefing, this discussion did not focus on whether to raze the apartment buildings.

violations or any other persons as witnesses. Nor did Freeman seek to learn more about the repair cost estimates after the panel informed him of them. *See Richardson v. Perales*, 402 U.S. 389, 407 (1971) (finding that the individual had an opportunity to confront the evidence against him where the government's reports were available to him, and the witnesses were known and were subject to subpoena and cross examination); *Cf. City of West Covina v. Perkins*, 524 U.S. 234, ___ 119 S.Ct. 678, 681-82, 142 L.Ed.2d 636, ___ (1999) (holding that the government need not tell an individual how to recover property seized pursuant to a police search where the state statutes and caselaw do so). Because the URSB panel made Freeman aware of the circumstances favoring demolition, Plaintiffs' assertion that the way in which the Board reached the decision to destroy the apartment buildings failed to accord with due process is without merit.[5]

The Plaintiffs also contend that the absence of a hearing before the liens attached to their properties violated due process. They assert that this omission violated due process because it resulted in the City incurring unreasonable demolition costs, which were passed on to

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[5] The events surrounding the rehearings make any nondisclosure at the earlier hearings immaterial. *See Glenn v. Newman*, 614 F.2d 467, 470, 473 (5th Cir. 1980) (holding that the decision to terminate the plaintiff after an ex parte hearing did not offend due process because the mayor and city council later heard the plaintiff's evidence and reaffirmed their decision to terminate).

them.[6] The Plaintiffs' argument lacks merit. The City gave Freeman and Brown thirty days to effect the demolitions. This option protected them against the risk of exorbitant demolition costs. A hearing on costs before the demolition could have done no more. Accordingly, we conclude that the lack of a hearing before the attachment of the liens did not violate due process. *Cf. Zinermon v. Burch*, 494 U.S. 113, 127-30 (1990).

## IV. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's summary judgments in favor of the City of Dallas on the due process claim and in favor of the Plaintiffs on their Fourth Amendment claim, and the award of damages under § 1983 for the violation of the Plaintiffs' Fourth Amendment rights.

EMILIO M. GARZA, Circuit Judge, dissenting in part:

Charles Freeman and Rosalyn Brown allege that the City of Dallas ("City") violated their Fourth and Fourteenth Amendment rights. The district court granted summary judgment to Freeman and Brown on the Fourth Amendment claim, and to the City on the Fourteenth Amendment claims. Judge Benavides and I agree with the second holding. I alone disagree with the first one. Accordingly, I dissent in part.

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[6] The Plaintiffs point to the more than $2000 disparity between the actual and estimated demolition costs for each apartment building as proof that the City paid too much.

I.

Brown acquired properties known as 2611 Meyers Street and 2621 Meyers Street located in Dallas, Texas. A vacant, dilapidated eight-unit apartment building stood on each lot. Brown intended to rent the apartment units after making repairs.

The Department of Housing and Neighborhood Services ("Department") cited both apartment buildings for non-compliance with the City's Minimum Urban Rehabilitation Standards Code ("Code"). When the Code violations were not corrected, it referred the matter to the Urban Rehabilitation Standards Board ("Board"), and recommended demolition.

After conducting a title search, the Board mailed a notice of hearing on each of the properties to the owner of record.[7] The notice announced that the Board might order demolition to remedy the Code offenses. It further stated that the property owner would "be given an opportunity to present evidence and witnesses if so desired."

In preparation for the hearings, Department staffers briefed the panel of Board members assigned to decide the fate of the Meyers Street properties. They also provided panel members with information on the properties,

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[7] The Board did not give Freeman notice because he had no interest in either property at the time. It sent Brown a notice on 2621 Meyers Street, the property of which she was the owner of record. (Brown became the owner of record for 2611 Meyers Street after the Board decided how to address the Code violations.)

including repair cost estimates,[8] and accompanied some of them on a tour of the premises.

Freeman appeared at the hearings, identifying himself as the "attorney-in-fact for Brown" and as an owner of 2611 and 2621 Meyers Street. He reported that he was without funds, and asked for more time to make repairs. Because of Freeman's inability to finance repairs and doubt about his ownership, the panel ordered the destruction of each apartment building as an urban nuisance.[9]

Freeman successfully petitioned the panel for a rehearing. The Board then mailed a notice of the rehearing on 2611 Meyers Street to Freeman and a notice of the

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[8] The Department determined that the estimated cost of repairs totaled $84,290.00 for 2611 Meyers Street and $108,680.00 for 2621 Meyers Street.

[9] The Code defined an "urban nuisance" as the following:

> [A] premises or structure that:
>
> (A) is reasonably dangerous to the physical health or safety of an occupant or other person; or
>
> (B) because of violations of [the Code] . . . , its state of disrepair is such that it could reasonably cause injury, damage, harm, or inconvenience to a considerable portion of the community in the use and enjoyment of property, materially interfering with the proper use or comfort and enjoyment of surrounding property, taking into consideration the nature and use of the properties in the area and the character of the community in which they are situated, which condition would be substantially offensive and annoying to persons of ordinary sensibilities, tastes, and habits living in the community.

Dallas, Tex., Code ch. 27, art. I, § 27-3(23) (1993).

rehearing on 2621 Meyers Street to Freeman and Brown. The substance of these notices was identical to that of the earlier hearing notices.

Two panel members visited the properties before the rehearings. They examined the exterior of the apartment building at 2611 Meyers Street. They ran into Freeman at 2621 Meyers Street. He showed them repairs inside of the apartment building. They told him to bring photographs of the repairs to the rehearings.[10]

At the rehearings, the Department showed pictures of the apartment buildings' exteriors. Freeman said that he anticipated acquiring most of the materials required to make repairs at little or no cost. He further stated that he hoped to finance repairs through a loan from the City, and had received a commitment from relatives in the construction business to help him make repairs if he secured funding from the City. Freeman also submitted photographs of repairs made to the interior of the apartment building at 2621 Meyers Street and a list of materials that he had collected already. Finally, he asserted that he could upgrade each unit of the apartment building at 2621 Meyers Street for $2000.00. Panel members responded skeptically to Freeman's presentation. Among their comments to Freeman were the following:

> MR. KIRKPATRICK: And I strongly appreciate you [sic] intent with what you would like to do with the property [i.e., 2611 Meyers Street]. The

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[10] Before the rehearings, the panel met with Department staffers to discuss Freeman's request to waive the rehearing fees.

property is in serious disarrayI mean, foundation, structurally. We saw . . . looked at the staff recommendations for improvement. Are you aware of the total of which they have estimated, $84,310?

. . .

MS. LOCKLEY: Are you aware of the amount of money the staff has sort of generally come up with to say how much your expenses might be for the repairs [to 2621 Meyers Street]?

Despite such statements, Freeman neither inquired about the basis for the repair cost estimates nor asked to question the Department officials responsible for them.

The panel again voted to declare the apartment buildings urban nuisances and to order their destruction because it still was unpersuaded that Freeman possessed the financial ability to make repairs in a timely manner. Freeman received a notice of demolition for each property at the end of the rehearings. The notice identified the parcel by lot and block number, as well as by street address, and stated that the panel's decision could be appealed to state district court for review under the substantial evidence rule.

The Board also sent a notice of the order to demolish the apartment building at 2611 Meyers Street to Freeman and a notice of the order to demolish the apartment building at 2621 Meyers Street to Freeman and Brown. Each notice declared, in part:

If you do not demolish the structure(s) within the time above indicated [i.e., 30 days], the city will arrange to have this work done and the

> expense of that demolition performed under contract with the city will constitute a lien on the real property on which the structure(s) were located, and that lien will run with the land.

Freeman and Brown did not petition the state district court to review the demolition orders. When they failed to raze the apartment buildings within thirty days, the City hired a contractor to do so. It did not convene a hearing to discuss demolition costs before the contractor undertook performance. Nor did it obtain a judicial warrant. After the demolitions, a lien attached to each piece of property equal to the cost of demolition$7954.72 for 2611 Meyers Street and $7655.55 for 2621 Meyers Street. Each lien exceeded by more than $2000.00 the demolition cost estimate that the Department had made when it had found the apartment buildings in violation of the Code.

Freeman and Brown filed a 42 U.S.C. § 1983 action against the City. They alleged that the destruction of apartment buildings constituted an unreasonable seizure in violation of the Fourth Amendment. They also maintained that the way in which the panel had decided to demolish the apartment buildings and the imposition of the liens contravened the Fourteenth Amendment's guarantee of procedural due process.

Freeman and Brown moved for summary judgment on the Fourth Amendment claim. In response, the City requested summary judgment on all claims. The district court granted summary judgment to Freeman and Brown on the Fourth Amendment claim, denied the City's cross-motion for summary judgment on the Fourth Amendment claim, and granted summary judgment to the City on the Fourteenth Amendment claims. After a trial on

damages for the Fourth Amendment violation, a jury awarded $20,000.00 to Freeman and Brown. Timely appeals followed the entry of final judgment.

II

We review a grant of summary judgment *de novo*. *See United States v. Johnson*, 160 F.3d 1061, 1063 (5th Cir. 1998). Summary judgment occurs if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Our review encompasses only the record on which the district court based its ruling. See *Topalian v. Ehrman*, 954 F.2d 1125, 1131-32 n.10 (5th Cir. 1992).

III

The City argues that the district court erred in granting summary judgment to Freeman and Brown on the Fourth Amendment claim. In its view, the district court wrongly held that the lack of a valid judicial warrant rendered the demolitions of the apartment buildings impermissible seizures.[11]

The Fourth Amendment declares:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon

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[11] The City does not contest that the demolitions were seizures. *See Soldal v. Cook County, Ill.*, 506 U.S. 56, 72, 113 S. Ct. 538, 549, 121 L. Ed. 2d 450, ___ (1992) (tearing mobile home from its foundation and towing it to another lot is a seizure).

> probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. In determining if a particular governmental action violates this constitutional guarantee, we initially must consider whether or not the action was regarded as an unlawful search or seizure under the common law when the Fourth Amendment was framed. *See Wyoming v. Houghton*, ___ U.S. ___, ___, 119 S. Ct. 1297, 1300, 143 L. Ed. 2d 408, ___ (1999). When this examination of the historical record yields no answer, we must decide whether or not the action was reasonable. *See id.*; *see also Ohio v. Robinette*, 519 U.S. 33, 39, 117 S. Ct. 417, 421, 136 L. Ed. 2d 347, ___ (1996) ("the touchstone of the Fourth Amendment is reasonableness" (internal quotations omitted)); *Carroll v. United States*, 267 U.S. 132, 147, 45 S. Ct. 280, 283, 69 L. Ed. 2d 543, ___ (1925) ("The Fourth Amendment does not denounce all searches and seizures, but only such as are unreasonable."). A "reasonableness determination . . . reflects a 'careful balancing of governmental and private interests.' " *Soldal v. Cook County, Ill.*, 506 U.S. 56, 71, 113 S. Ct. 538, 549, 121 L. Ed. 2d 450, ___ (1992) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 341, 105 S. Ct. 733, 742, 83 L. Ed. 2d 720, ___ (1985)). We deem a seizure reasonable when the government has acted pursuant to a valid judicial warrant that is, a warrant supported by probable cause that particularly describes the things to be seized. *See United States v. Place*, 462 U.S. 696, 701, 103 S. Ct. 2637, 2641, 77 L. Ed. 2d 110, ___ (1983). We also uphold a seizure made without a valid judicial warrant if it strikes the appropriate balance between the competing private and government interests. *See Johnson*

*v. United States*, 333 U.S. 10, 14-15, 68 S. Ct. 367, 369, 92 L. Ed. 436, ___ (1948). For example, in some circumstances we may find permissible a warrantless seizure of property that occurs after the government has provided the owner with due process. *See G. M. Leasing Corp. v. United States*, 429 U.S. 338, 352 n.18, 97 S. Ct. 619, 628 n.18, 50 L. Ed. 2d 530, ___ n.18 (1977) ("These cases, of course, center upon the Due Process Clause rather than the Fourth Amendment, but the constitutional analysis is similar and yields a like result.").

I agree with the City that the demolitions were reasonable seizures.[12] The intended commercial use of the apartment buildings lessened the interests of Freeman and Brown. *See New York v. Burger*, 482 U.S. 691, 700, 107 S. Ct. 2636, 2642, 96 L. Ed. 2d 601, ___ (1987) ("An expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual's home."); *Hroch v. City of Omaha*, 4 F.3d 693, 697 (8th Cir. 1993) (demolition case) (finding that the owner's interest in commercial property "was negligible because he failed to take 'normal precautions to maintain his privacy' "). In contrast, the City possessed a strong interest in demolition – the need to protect the public from hazardous buildings. *See Camara v. Municipal Court of City & County of San Francisco*, 387 U.S. 523, 537, 87 S. Ct. 1727, 1735, 18 L. Ed. 2d 930, ___ (1967) (discussing when a housing inspector may inspect buildings

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[12] Neither side makes arguments regarding the lawfulness of the type of seizures at issue here under the common law when the Fourth Amendment was framed. Instead, everyone focuses on the reasonableness of the seizure.

without a warrant) ("the public interest demands that all dangerous conditions be prevented or abated"). It, moreover, effected the seizures after Freeman and Brown had received reasonable notice, a meaningful opportunity to be heard, and a chance to seek judicial review. This due process guarded the interests of Freeman and Brown just as well as a valid judicial warrant. *See Samuels v. Meriwether*, 94 F.3d 1163, 1168 (8th Cir. 1996) ("[Our] . . . holdings suggest that an abatement [of a nuisance] carried out in accordance with procedural due process is reasonable [as to the Fourth Amendment] in the absence of any factors that outweigh governmental interests."); *Connor v. City of Santa Ana*, 897 F.2d 1487, 1495 (9th Cir. 1990) (Trott, J., dissenting) ("A warrant and the process used to attain it would have added nothing to the [property owners'] . . . privacy in light of the equivalent substitute process they did receive, or to the independent [judicial] review to which they were entitled."). The City therefore did not violate the Fourth Amendment in this case.[13] The majority errs in holding otherwise.

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[13] The majority apparently patterns its analysis of the Fourth Amendment claim on *Connor v. City of Santa Ana*, 897 F.2d 1487 (9th Cir. 1990). In *Connor*, municipal authorities claimed that a warrantless confiscation of two abandoned automobiles located on private property was permissible because the entry and seizure were preceded by numerous hearings and appeals. *See id.* at 1489, 1490-91. The Ninth Circuit rejected the argument, holding that the Fourth Amendment obliged the officials to secure a valid judicial warrant because of the absence of "any case . . . [that] has created a 'process' exception to the warrant requirement." *Id.* at 1491. I disagree with *Connor*. When a warantless search or seizure fails to fit within any of the exceptions to the warrant requirement, we do

IV

Unlike the majority, I conclude that the district court improperly granted summary judgment to Freeman and Brown on the Fourth Amendment claim.

Accordingly, I dissent in part.

DENNIS, Circuit Judge, dissenting in part:

A governmental seizure of a person's property implicates two explicit textual sources of constitutional protection, the Fourth and Fifth Amendments. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 49-50 (1993); *Soldal v. Cook County*, 506 U.S. 56, 61, 70-71 (1992). Although the decision in *James Daniel Good Real Property* was based upon the procedural protections of the Fifth

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not, as the Ninth Circuit did in *Connor* and as the majority does in this case, reflexively invalidate it. Rather, we balance the governmental and private interests to determine the legality of the warrantless search or seizure. *See Whren v. United States*, 517 U.S. 806, 817, 116 S. Ct. 1769, 1776, 135 L. Ed. 2d 89, ___ (1996) ("It is of course true that in principle every Fourth Amendment case, since it turns upon a 'reasonableness determination,' involves a balancing of all relevant factors."); *California v. Acevedo*, 500 U.S. 565, 581-84, 111 S. Ct. 1982, 1992-94, 114 L. Ed. 2d 619, ___ (1991) (Scalia, J., concurring in the judgment) (recognizing that reasonableness, not the existence of a valid judicial warrant, is the Fourth Amendment's chief concern); *Johnson v. United States*, 333 U.S. 10, 14-15, 68 S. Ct. 367, 369, 92 L. Ed. 436, ___ (1948) ("When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by the judicial officer, not by a police-man or Government enforcement agent. There are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with.").

Amendment's Due Process Clause, the similarly worded procedural protections of the Fourteenth Amendment's Due Process Clause apply with equal force to states and municipalities.[14]

The City does not, and could not, dispute that the seizure and destruction of the plaintiffs' real property

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[14] The Supreme Court has held that the Fourteenth Amendment's Due Process Clause "legitimately operates to extend to the citizens and residents of the States the same protection against arbitrary state legislation, affecting life, liberty and property, as is offered by the Fifth Amendment against similar legislation by Congress." *Hibben v. Smith*, 191 U.S. 310, 325 (1903). Of the guarantees of the Fifth Amendment, only the grand jury clause has been held not to be applicable to the states. 2 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 14.2, at 347-48 (2d ed. 1992) (citing *Hurtado v. California*, 110 U.S. 516 (1884)). The Fifth Amendment prohibitions of compulsory self-incrimination and double jeopardy were made applicable to the states in *Malloy v. Hogan*, 378 U.S. 1 (1964), and *Benton v. Maryland*, 395 U.S. 784 (1969), respectively. In addition, although the Fifth Amendment's just compensation provision has not "technically" been incorporated against the states, "the Court has held that the fourteenth amendment due process guarantee provides the same safeguard against a state's taking of property without just compensation." Rotunda & Nowak, *supra*, § 14.2, at 350 (citing *Chicago B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897)). *See also Hurtado v. California*, 110 U.S. 516, 541 (1884) (Harlan, J., dissenting) ("[T]he 5th [amendment] provided that 'no person shall be deprived of life, liberty or property, without due process of law.' This language is similar to that of the clause of the 14th amendment now under examination. That similarity was not accidental, but evinces a purpose to impose upon the States the same restrictions, in respect of proceedings involving life, liberty and property, which had been imposed upon the General Government.").

deprived them of property interests protected by the Fifth and Fourteenth Amendments' Due Process Clauses. The City argues, however, that a hearing before a panel of the City's own Urban Rehabilitation Standards Board afforded the plaintiffs all the process they were due before their property was seized and destroyed. Although the majority agrees, I believe that in the absence of an extraordinary situation, which did not exist in the present case, the Due Process Clauses require that, before a person is deprived of his real property by the government, he must be given notice and an opportunity for a meaningful hearing before a neutral magistrate, and that there must be a judicial determination that the seizure is justified.

Where the government seizes property not to preserve evidence of criminal wrongdoing but to assert ownership and control over the property, its action must also comply with the procedural protections of the Due Process Clauses of the Fifth and Fourteenth Amendments. *See United States v. James Daniel Good Real Property*, 510 U.S. 43, 49-50 (1993), and footnote 1, supra. The Supreme Court's precedents establish the general rule that Due Process requires that, absent an extraordinary situation, a party cannot invoke the power of the state to seize a person's property without a prior judicial determination that the seizure is justified. *United States v. $8,850*, 461 U.S. 555, 562 n.12 (1983) (citing *Boddie v. Connecticut*, 401 U.S. 371, 378-379 (1971)). See also *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1974). *Cf. Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974). Due Process also requires that individuals must

receive notice and an opportunity to be heard before the government deprives them of property. *James Daniel Good Real Property*, 510 U.S. at 48 (citing *United States v. $8,850*, supra; *Fuentes v. Shevin*, supra; *Sniadach v. Family Finance Corp.*, 395 U.S. at 342 (Harlan, J., concurring); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)).

In *United States v. James Daniel Good Real Property*, supra, the Supreme Court held that, in the absence of exigent circumstances, the Due Process Clause requires the government to afford notice and a meaningful opportunity to be heard in an adversary hearing, to ensure the requisite neutrality that must inform governmental decisionmaking, before seizing real property subject to civil forfeiture. *Id.* at 48, 53-56. The protection of an adversary hearing before a neutral magistrate is of particular importance where the government has a direct pecuniary interest in the outcome of the proceeding. *Id.* at 55-56. In *James Daniel Good Real Property*, the Supreme Court emphasized that "[t]he constitutional limitations we enforce in this case apply to real property in general, not simply to residences." Id. at 61.

Accordingly, the Due Process requirements of notice, a meaningful adversary hearing before a neutral magistrate, and a judicial determination of justification must be afforded to a person before his real property is seized and destroyed in order to abate or rehabilitate an "urban nuisance." In a case such as the present one, there is need for equally rigorous adherence to the principles of Due Process as in civil forfeitures of real property. The City of Dallas has pecuniary interests in the outcome of such proceedings, e.g., justification for federal and state urban renewal grants; enhancement of the municipal tax base

by promoting the replacement of old buildings with new ones. The need for safeguards against arbitrary, capricious or unreasonable seizures based on subjective standards may be even greater in "urban nuisance" or "urban rehabilitation" cases. Moreover, a post-seizure hearing cannot provide any remedy in such cases because the destroyed property cannot be restored and the best evidence of whether the seizure was justified will have been demolished also. It is not necessary to accomplish the City's legitimate goals of urban rehabilitation that an owner whose real property the City proposes to destroy be deprived of an opportunity for a meaningful pre-seizure adversary hearing before a neutral and impartial judge or magistrate. Requiring the City to postpone seizure and destruction until after such a hearing and judicial determination that the seizure is justified creates no significant administrative burden. And any harm that results from delay is minimal in comparison to the injury occasioned by the erroneous seizure and destruction of real property. *Id.* at 59.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

| | | |
|---|---|---|
| Charles Freeman and Rosalyn Brown, plaintiffs | ) | No. 3:96-CV-1108-DES |
| v. | ) | |
| City of Dallas, defendant | ) | |

JUDGMENT

(Filed Aug 13 1997)

For the reasons set forth on the record on July 24, 1997, it is ordered that Plaintiffs' Motion for Partial Summary Judgment be granted in part and denied in part and Defendant's Motion for Summary Judgment be granted in part and denied in part as follows:

1. As a matter of law, the Court finds that the City's seizure and demolition of plaintiffs' structures at 2611 and 2621 Meyers St. without a warrant was an unreasonable seizure of plaintiffs' property in violation of the Fourth Amendment to the U.S. Constitution.

2. The Court finds that the Urban Rehabilitation Standards Board [URSB] alone sets and carries out the policy for the City of Dallas with regard to establishing minimum standards applicable to residential and nonresidential structures. This kind of binding policy making authority constitutes official policy of the City of Dallas. The Court finds and orders that the City is liable under 42

U.S.C. § 1983 as a matter of law for the conduct of the URSB which caused or contributed to the cause of plaintiffs' harm.

3. As a matter of law, the Court finds that plaintiffs were not deprived of due process under the Fourteenth Amendment to the U.S. Constitution by the URSB hearing process or by the failure to provide a hearing on the amount or legality of the lien for the costs of demolition.

This case was submitted to the jury on the issue of damages to be awarded to plaintiffs for deprivation of the Fourth Amendment constitutional right not to have property seized without a warrant. For this deprivation, the jury awarded $20,000 in damages to plaintiffs and $0 in emotional distress or mental anguish for a total damage amount of $20,000.

It is ordered that the City of Dallas pay plaintiffs $20,000. Post-judgment interest shall accrue from the date of entry of the judgment pursuant to 28 U.S.C. § 1961 at the federal rate.

This judgment is final except for any motion for attorneys' fees and expenses.

8-11-97
DATE

/s/ Dale E. Saffels
UNITED STATES
DISTRICT JUDGE
Dale E. Saffels
Sitting by Designation

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

| | | |
|---|---|---|
| CHARLES FREEMAN and ROSALYN BROWN | * | Civil No. 3:96-CV-1108 |
| vs. | * | Dallas, Texas |
| CITY OF DALLAS | * | July 24, 1997 9:00 a.m. |

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Volume 1
TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE DALE E. SAFFELS,
SENIOR UNITED STATES DISTRICT JUDGE
and a Jury

(Filed Oct. 23, 1997)

APPEARANCES:

| | |
|---|---|
| For the Plaintiffs: | Mr. Michael M. Daniel and<br>Ms. Laura B. Beshara<br>Attorneys at Law<br>3301 Elm Street<br>Dallas, Texas 75226-1637<br>(214) 939-9230 |
| For the Defendant: | Mr. Walter C. Davis, III and<br>Mr. W. Kent McIlyar<br>Assistant City Attorneys<br>1500 Marilla Street<br>Dallas, Texas 75201<br>(214) 670-3510 |
| Official Court Reporter: | Deborah M. Roberts, CSR<br>523 United States Courthouse<br>501 West 10th Street<br>Fort Worth, Texas 76102-3637<br>(817) 239-2037 |

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

* * *

[14] We think the law shows that, in fact, when you are seizing people's property, you have to have either a warrant or a judicial order in order to satisfy the Fourth Amendment.

On the liens, the Fifth Circuit – the Supreme Court is also very clear. Imposition of a lien which causes a burden on title requires due process itself. In this instance, the City determines the cost of the demolition, pays the cost. There's no relationship, necessarily, to the cost that is even talked about at the hearing, if it's talked about at all, then that lien is put on there. That clearly requires a separate due process procedure.

Thank you, Your Honor.

THE COURT: Any response?

MR. McILYAR: Not at this time, Your Honor.

THE COURT: Anything further to present on this general issue, disposition of these legal questions?

MR. DANIEL: Pardon? I'm sorry.

THE COURT: Anything else you want to present on –

MR. DANIEL: Plaintiffs have nothing further, Your Honor.

MR. McILYAR: Defendant has nothing further, Your Honor.

THE COURT: Very well. We spent some time on this file before the hearing this morning, and we heard your arguments, and we're going to make our ruling here.

[15] Number one, the Court finds the Fourth Amendment requires that the state must have a valid warrant to effectuate a seizure. This warrant requirement applies regardless of how reasonable the warrant procedure appears in light of the pre-seizure process afforded the plaintiffs. Because the seizure of the plaintiffs' buildings occurred without any judicial authorization, the Court finds that the seizure as a matter of law violated the plaintiffs' Fourth Amendment rights.

Number two, due process before demolition. The Court finds the abrogation of a well-established common law protection against arbitrary deprivations of property raises a presumption that its procedures violate the due process clause. See case Honda Motor Company, Limited, versus Oberg, 510 U.S. 1068, 430 [sic], 1994. However, not all deviations from established procedure result in constitutional infirmity. Where procedures provide protection against other arbitrary and inaccurate adjudication, and there is little danger of arbitrary deprivation of property, the United States Constitution does not require that a judicial determination precede deprivation. See Traylor versus City of Amarillo. Both of you are familiar with that case.

In this case the Court finds as a matter of law that the due process does not require that a full judicial determination precede demolition of property found to be a [16] nuisance by the URSB. The Court also finds that the –

that adequate procedural safeguards and the notices hearings and opportunities for compliance were provided by the URSB.

Number three, due process before filing demolition cost liens. The Court finds as a matter of law that the City did not violate plaintiffs' due process rights by filing liens to recover demolition, expenses against the real property on which the demolished structures were located.

Four, official policy of the City of Dallas. The Court finds that under Swann versus City of Dallas, 922 F.Supp. 1184, Northern District of Texas, 1996, URSB alone sets and carries out the policy of the City of Dallas with regard to establishing minimum standards applicable to residential and non-residential structures. This kind of binding policy-making authority constitutes the kind of official policy for which the City may be held liable.

It appears to us that we have left a question of damages on the failure to obtain a search warrant, and we're prepared to go to trial on that at 10:00 this morning.

Any questions?

MR. DANIEL: No questions, Your Honor.

THE COURT: Is there any chance of settling that issue?

MR. DAVIS: Your Honor, we'll certainly discuss it with plaintiff in this case, but I would not lead the Court to

* * *

[128] MR. DAVIS: No questions, Your Honor.

THE COURT: It's been a pleasure to do business with you. All of you have a good day.

MR. DANIEL: Thank you, Judge.

MR. DAVIS: Thank you, Your Honor.

THE COURT: You may recess the Court.

(Proceedings concluded at 4:30 p.m.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. I further certify that the transcript fees format comply with those prescribed by the Court and the Judicial Conference of the United States.

/s/ Deborah M. Roberts — 10-23-97

Deborah M. Roberts, — Date
Official Court Reporter
Texas CSR #3770